Supreme Court, U.S.
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No. 97-186

In The

Supreme Court of the United States

October Term, 1996

VERN T. WEISS, et al.,

Petitioners,

v.

STATE OF ALASKA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Alaska Supreme Court

BRIEF FOR THE STATE OF ALASKA IN OPPOSITION

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QUESTIONS PRESENTED

In 1994, after extensive briefing, a four day evidentiary hearing on preliminary approval, notice to the class, comments from the class favoring settlement by a two-to-one margin, and a two week evidentiary hearing on final approval, an Alaska Superior Court approved the settlement of a twelve-year-old class action, finding it fair, adequate, and reasonable. In 1997, after thoroughly reviewing that decision, the Alaska Supreme Court affirmed. The questions presented are:

1. Does a state court approval of a settlement of claims arising out of a federally created trust implicate any federal rights of class members when no adjudication of federal law occurs during the approval process?

2. May dissenting class members claim a violation of due process or other federal rights with regard to state court decisions issuing relief which they themselves requested?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF *CERTIORARI*

Respondent State of Alaska respectfully opposes Petitioners' request for a writ of *certiorari*.

JURISDICTION

Petitioners ask this Court to review, *inter alia*, the Alaska courts' allowance of monies spent by the state on mental health care as a set-off against the state's potential liability in *State v. Weiss*, 706 P.2d 681 (Alaska 1985) ("*Weiss I*"), Appendix to Petition for Certiorari B ("App. B.") B-4, 8. For purposes of review, however, *Weiss I* became final when it was published on October 4, 1985. Assuming, *arguendo*, that the allowance of the set-off presents a federal question, it was conclusively decided in 1985, and the outcome of further proceedings with respect to whether the set-off applies was "preordained" on remand. *See, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479 (1975). Review in this Court was not timely sought, and this Court does not have jurisdiction to review that twelve-year-old opinion. Sup. Ct. R. 13; 28 U.S.C. § 2101(c).

INTRODUCTION

This petition arises from a settlement, not from an adjudication on the merits. Three individuals (collectively "Weiss") ask this Court to review a judgment of the Alaska Supreme Court, *Weiss v. State*, 939 P.2d 380 (Alaska 1997) ("*Weiss II*," App. A), affirming a trial

court's approval of a settlement as fair, adequate, and reasonable. App. C.

This case presents no question of federal law. The federal statute tangentially involved here is unique and differs substantially from other public land trust statutes. No conflicts between or among courts and no special or compelling reason to place it on this Court's restricted docket are presented. Instead, Weiss's claims reduce to complaints that the Alaska courts, though applying the correct legal standard for evaluating a proposed class action settlement (comparison of the benefits offered in settlement with the likely results of litigation[1]), did not adopt *his* view of the legal and factual litigation risks. *Cf.* Sup. Ct. R. 10 (*certiorari* "rarely granted" when asserted error consists of erroneous factual findings or properly stated rule of law).

At bottom, Weiss asks this Court to review the factual findings and discretionary decisions of the Alaska courts and rule as a matter of law that the trial court fundamentally misunderstood the litigation it presided over for eight years and erroneously evaluated the evidence presented in over two weeks of hearings on the fairness, adequacy and reasonableness of the settlement. The Alaska Supreme Court thoroughly reviewed both the trial court's decision and the approval process and concluded that the trial court's approval of the settlement "demonstrated a sound

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[1] *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) (courts to judge fairness of proposed settlement by weighing plaintiff's likelihood of success on merits against benefits offered in settlement; courts are not to decide merits of case or resolve unsettled legal questions).

understanding of the relevant authority and the facts of this case, as well as a keen regard for the rights and interests of the plaintiff class." *Weiss II*, App. A-49.

The Alaska courts were correct. Nothing about this case compels further review in this Court.

STATEMENT OF THE CASE[2]

1a. In 1956 Congress granted Alaska one million acres of federal land in trust to fund a mental health program for Alaska. Alaska Mental Health Enabling Act, Pub. L. No. 84-830, 70 Stat. 709 (1956) ("AMHEA"); *Weiss I*, App. B. Unlike other public land trusts, the AMHEA expressly authorized the expenditure of both income and proceeds from any dispositions of trust land, did not restrict those expenditures exclusively to the stated purpose (mental health) and vested the Alaska legislature with broad discretion in managing the trust. In 1978, the state legislature redesignated the trust land as general grant land. In 1982, this class action was filed alleging that Alaska had breached the trust.[3] *Weiss I*, App. B-4.

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[2] The settlement now before this Court closes a long and complex procedural and factual history. Weiss's lengthy Statement of the Case omits much. A more complete picture is set forth by the courts below. *See* App. C, A; Respondents' Appendix (hereinafter "R. App.").

[3] The class was certified under Alaska R. Civ. P. 23(b)(2) (*i.e.*, seeking only injunctive or declaratory relief for the class as a whole; no monetary relief to be distributed to individual class members). App. C-29-30.

b. In 1985, the Alaska Supreme Court agreed. The court remanded for the trust to "be reconstituted to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective." *Weiss I*, App. B-7. The trial court was instructed that "sold" lands would not be returned to the trust; instead the trust would be compensated at fair market value. In calculating the total amount owed, the trial court was instructed to grant a set-off for mental health expenditures made by the State during the same period. App. B-8.

c. Following the *Weiss I* remand, the parties realized that to reconstitute the trust as directed would be a Herculean task. It would implicate literally thousands of factual determinations, for example, over "sold" parcels and mental health expenditures.[4] It could take years to resolve, and cost millions of dollars. App. C-6-8, 11-12, 54-55.

The *Weiss I* remand instructions also posed significant litigation risks to both sides. Therefore, the parties actively pursued a settlement. Major attempts at settlement were made through legislation in 1987, 1990 and 1991, before the case was finally settled in 1994 in the HB 201 settlement.[5] App. A-7-9.

Counsel for Weiss were proponents of the 1991 settlement attempt (the "chapter 66 settlement"). It contemplated parcel-by-parcel exchanges. The trust would retain

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[4] In 1994, it was estimated that the State had spent more than $1.3 billion on mental health that could be set-off under *Weiss I*. App. C-62-63.

[5] "HB 201" refers to the first draft of the enabling settlement legislation; it is the designation adopted by the parties and courts in the proceedings below.

certain original trust parcels and the rest would consist of replacement state land selected by plaintiffs.[6] App. C-14; *Weiss II*, App. A-9. Chapter 66 also amended portions of the State's mental health program and created a new agency, the Alaska Mental Health Trust Authority, to act as trustee. *Id.*; App. C-14. In December, 1993 the court denied preliminary approval to the chapter 66 settlement. App. C-16.

2a. Negotiations for the HB 201 settlement spanned six months, January-June, 1994. All counsel actively participated in the negotiations. The settlement built on the failed chapter 66 settlement.

b. The resulting settlement reconstitutes the trust with almost 1 million acres of land (approximately 60 percent original trust land and 40 percent replacement land, identified by Weiss's land staff). It establishes the Alaska Mental Health Trust Authority to act as trustee and to oversee the State's mental health program, creates special budgeting advantages for mental health program funding, and makes various mental health program improvements. It does not include any set-off.

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[6] Weiss assembled an expert land staff funded by the State to evaluate trust land and potential replacement land. The staff included petitioner Nanuwak's counsel, James Gottstein, and was headquartered in his law offices. The staff compiled considerable information on trust land and potential replacement land. The State paid Weiss's counsel and land staff more than $2.1 million to study land pursuant to the chapter 66 settlement. R. 19329-19331. These amounts were in addition to court awarded attorney fees and costs. In all, Weiss's counsel have been paid more than $7 million for their participation in this case. R. 25436, 25882.

The settlement also provides benefits desired by Weiss and the class that will be lost if litigation is continued. It preserves corpus by establishing a permanent fund for mental health programs with $200 million, and proceeds from trust land disposals attributable to principal will be invested there, as well.

The settlement provides for management of trust land "solely in the best interests of the beneficiaries" through a special unit within the Alaska Department of Natural Resources. App. C-19-29; Alaska Stat. § 38.05.801; 11 Alaska Admin. Code 99.020.

3a. The settlement approval process covered seven months, June-December, 1994. Following extensive briefing, the court held a four day hearing on preliminary approval. Tr. XIII-XVI. The trial court carefully scrutinized the negotiations and concluded that they were serious, informed, and noncollusive. R. App. 23-30; App. C-38 n.46. The Court granted preliminary approval on July 29, 1994. R. App. 58.

b. Notice of the proposed settlement was given to the class in August 1994.[7] The notice was mailed to every postal address in Alaska, published in the State's 23 largest newspapers, and announced on radio and television. Plaintiffs' attorneys and advocacy groups held meetings for beneficiaries and their families or guardians

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[7] On Weiss's motion, the class was redefined, by order dated August 2, 1994, to make the class "co-extensive with the beneficiaries of the trust." *Weiss II*, App. A-39; C-31. Weiss now claims that this redefinition he sought constitutes error. Pet. 26-27.

to explain the settlement and answer questions about it. App. C-32-37.

The notice and comment period lasted more than ten weeks. Both written and oral comments were received and reviewed by the court. App. C-36, 80, 84. Overall, the class favored the settlement by a two-to-one margin. App. C-80, C-84-85.

c. After more briefing, the court held a two week evidentiary hearing on whether final approval should be granted. App. C-39 n.49; *Weiss II*, App. A-48; Tr. XVII-XXVI.

4a. While Weiss attacked the settlement on various grounds, his opposition derived principally from the opinion of a single expert that non-returned original trust land holds minerals worth "billions of dollars." This notion continues to permeate Weiss's pleadings. Pet. 14, 24.

b. The record, however, does not support such inflated values. Weiss's mineral expert's methodology was thoroughly discredited by experts called by the settlement proponents. App. C-63-73. Their criticisms, which the trial court found credible, reduced Weiss's mineral value estimates by 90 percent. *Id.*; *Weiss II*, App. A-16-17. The trial court concluded "[t]he risk is that trial would result in a finding of gross overstatement." App. C-70.

5. Ultimately, in December 1994, in a 137-page decision exhaustively explaining her reasoning, addressing each point in opposition, and following each applicable standard, the trial court granted final approval of the settlement, finding it to be fair, adequate, and reasonable and in the best interest of the class. App. C. Weiss appealed.

In a thorough 55-page opinion, the Alaska Supreme Court affirmed the superior court's decision. App. A.[8]

REASONS FOR DENYING THE WRIT

I. NO FEDERAL QUESTION IS PRESENTED; NEITHER THE DECISIONS BELOW NOR THE RECORD RAISE THE QUESTIONS PRESENTED IN THE PETITION.

1a. Weiss makes various attempts to convince this Court that the Alaska courts adjudicated important federal questions, made rulings that conflict with rulings of this and other courts, and violated his federal rights. Weiss obscures the procedural posture of the case, relies on factual assertions that have no support in the record, and omits relevant facts. On almost every issue he raises in the petition, moreover, Weiss took a contrary position below and has failed to preserve the arguments now advanced.

b. This petition does not arise from an adjudication on the merits; it arises from the state courts' approval of a settlement of the class's claims. No federal question was decided; no federal question is properly raised here. In approving the settlement, the Alaska courts scrupulously followed Alaska's rules pertaining to class action settlements.[9] App. A, C; R. App.

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[8] Petitioner's Appendix compresses and re-paginates the decisions.

[9] Since the case was filed in state court under Alaska R. Civ. P. 23, the state rules apply. However, Alaska's rules on

All but one of the issues that Weiss suggests were "adjudicated" or "determined" were not.[10] They were simply weighed as litigation risks, for purposes of comparison with the settlement. The Alaska courts properly did not reach the merits of the case or resolve unsettled legal questions. *Carson*, 450 U.S. at 88 n.14 ; *Weiss II*, App. A-14 n.10. Since the questions raised by Weiss were not actually decided below, this case does not merit review. *Mississippi Univ. For Women v. Hogan*, 458 U.S. 718, 723 n.7 (1982) (this Court reviews "judgments, not statements in opinions").

II. EVEN IF A FEDERAL QUESTION HAD BEEN DECIDED (AND NONE WAS), REVIEW WOULD NOT BE WARRANTED BECAUSE THE AMHEA IS UNIQUE AND DIFFERS SUBSTANTIALLY FROM ALL OTHER PUBLIC LAND TRUST STATUTES.

Even if the Alaska courts had actually decided the questions raised in the petition, this Court's discretionary review would not be warranted. The AMHEA tangentially involved here and the settlement under it are unique to Alaska and affect only Alaskans. *See* App. A-19-22 (distinguishing the school trust cases relied on by Weiss based on differences between the AMHEA and the detailed disposal procedures and constitutional provisions governing the school trusts). Any determination

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approving class action settlements are consistent with those applied under the federal rule. *See* App. A-12-14.

[10] The only exception to this is the redefinition of the class, made on Weiss's own motion. Weiss's arguments regarding the class definition are addressed in § IV. D.

regarding the requirements of the AMHEA would rest solely on its unique terms and would have no application to any other state.

Because the questions raised in the petition (even though not decided below) have significance only to Alaska, this case does not present an important federal question meriting review by this Court. Sup. Ct. R. 10 (requiring petition to raise an *important* federal question).

III. BECAUSE THE AMHEA IS UNIQUE AND DIFFERS SUBSTANTIALLY FROM ALL OTHER PUBLIC LAND TRUST STATUTES, THERE IS NO CONFLICT WITH THIS OR OTHER COURTS.

Similarly, the fact that the AMHEA is unique and differs substantially from all other public land trust statutes means that the Alaska courts' approval of this class action settlement does not conflict with "rulings of this and the other courts considering the same legal issue" as Weiss claims. Pet. 18. Neither this Court nor any other has had occasion to rule on "the same legal issues" and, given the uniqueness of the AMHEA, will not likely have occasion to do so in the future. Cases from this or other courts construing different public land trust statutes that contain vastly different terms applicable to other states are simply inapposite, not conflicting.

Because no conflict with this or other courts is presented, *certiorari* should be denied.

IV. THERE IS NO OTHER SPECIAL OR COMPELLING REASON FOR GRANTING REVIEW.

Class members favored the settlement over continued, protracted litigation by a two-to-one margin. The bottom-line question, whether the settlement is fair, adequate, and reasonable, turns on the unique and complex facts of the case, especially those involving valuation issues. *See* App. C-63-74. Two Alaskan courts carefully considered those unique and fact-dependent questions and concluded that the settlement is in the class's best interest. This Court should not review, much less disturb, that determination.

A. The Alaska courts correctly weighed the litigation risk posed by the set-off. Weiss waived arguments to the contrary. No federal question was decided, and no conflict is presented.

1a. Weiss first argues that the Alaska courts misapplied federal law with respect to the set-off provided for in *Weiss I*. Pet. 18-22. Indulging Weiss's untimely contention that the set-off established in *Weiss I* is not binding, the trial court and *Weiss II* considered the set-off as one of the many litigation risks against which the benefits of settlement were weighed. The Alaska courts correctly analyzed that risk, and no important issue or conflict justifying review by this Court exists.

b. There is a clear litigation risk that the *Weiss I* court's decision is final and that collateral estoppel principles, under state law, bar relitigation of that issue. Weiss and any other plaintiff could have sought relief from the 1985

judgment allowing the set-off, but never did so. *Cf. Richards v. Jefferson County, Ala.*, ___ U.S. ___, 116 S. Ct. 1761 (1996).

2. Moreover, Weiss took a position below that is completely contrary to the position he takes here. In seeking approval of the chapter 66 settlement, he stated:

> The impact of the setoff [sic] is substantial. . . . [T]here is no question that a significant amount of money has been spent on the mental health program and can be setoff [sic] under the Supreme Court's decision. . . . [I]f the litigation continues it would only be after the value of the trust corpus was reduced by the amount of the setoff [sic] that the trust would receive any compensation in money. . . . [I]t would be imprudent to expect either the Alaska Supreme Court to overrule itself on this point, or the United States Supreme Court to reverse the Alaska Supreme Court.

Exc.[11] 1064-1065 (footnote omitted).

3a. The high litigation risk that both Weiss and the Alaska courts attributed to the set-off comes directly from the express terms of the AMHEA itself. Section 202(e) of the AMHEA provides, in relevant part:

> All lands granted . . . together with the income therefrom and the proceeds from any dispositions thereof, . . . shall first be applied to meet the necessary expenses of the mental health program of Alaska. Such lands, income, and proceeds shall be managed and utilized as the

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[11] The designation "Exc." refers to the Excerpt of Record prepared for the Alaska Supreme Court.

> Legislature of Alaska may provide. Such lands . . . may be sold . . . or otherwise disposed of in such manner as the Legislature of Alaska may provide, in order to obtain funds . . . to be invested, expended, or used by . . . Alaska.

b. The *Weiss II* court agreed with the trial court that the language of the AMHEA could be reasonably interpreted as expressly permitting the State to fund mental health programs by selling trust assets. *Weiss II*, App. A-26. Again, the Alaska courts reviewing the settlement did not decide that the set-off applied; they correctly determined that there was a significant risk that it would apply if the case were litigated to conclusion.

4. Further, *Weiss II* found an independent state ground for affirming the trial court's risk analysis regarding the set-off: the set-off is consistent with general trust principles. App. A-26-27, nn.21, 22; *see, e.g., Restatement (Second) of Trusts* § 244 and comments c and e (1959) (trustee entitled to reimbursement from the trust estate for expenditures on behalf of beneficiaries).

B. The Alaska courts correctly weighed the litigation risk that certain original trust lands would be considered "sold" and not recoverable: no federal question was decided, nor is any conflict presented.

1. Weiss next argues that the settlement should have been rejected because the trust is entitled to recover land

disposed of in breach of trust.[12] Pet. 22-23. His argument reduces to this: the Alaska courts erroneously assessed the litigation risk that the trust could not recover lands sold to third parties. Weiss bases this claim of error on cases from Arizona and Nebraska interpreting their respective enabling acts. *Id.*

Nothing here is worthy of review. The question was weighed, not adjudicated. Absent a decision on point, there can be no conflict with a decision from any other court. *Hogan*, 458 U.S. at 723, n.7.

2a. Even if Weiss's argument is indulged, his reliance on Arizona and Nebraska school trust cases to establish a conflict is misplaced. There are crucial legal and factual differences between those cases and this one. The Arizona trust requires preservation of corpus in perpetuity, mandates detailed procedures to dispose of trust land, dedicates the proceeds of disposals to school purposes and expressly provides that any sale or lease "not made in substantial conformity with the provisions of [the Arizona Enabling Act] shall be null and void." *Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458, 462 (1967); *see also, ASARCO, Inc. v. Kadish*, 490 U.S. 605, 625-29 (1989) (describing terms of Arizona Enabling Act).

In contrast, the AMHEA authorizes expenditures of both income and proceeds from disposal of trust lands, vests broad discretion in the Alaska legislature to adopt

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[12] This argument begs the question it purports to answer. The 1978 legislation that redesignated trust land as general grant land was a breach of trust. However, to-date, not a single disposition of any trust parcel to a third-party has been determined to have been in breach of trust.

procedures for disposals and requires only that income and proceeds from disposals "first" be used to fund mental health programs. AMHEA § 202(e).

b. Similarly, the Nebraska cases rely on trust duties fixed in Nebraska's constitution. *See, e.g., State ex rel. Ebke v. Board of Educ. Lands and Funds*, 47 N.W. 2d 520, 523 (Neb. 1951). Therefore, "violation of [Nebraska's] duty as trustee is a violation of [Nebraska's] constitution itself." *Id. See also, State v. University of Alaska*, 624 P.2d 807, 815 n.11 (Alaska 1981) (distinguishing Nebraska trust cases based on differences in state constitutional law).

c. Given these distinctions, it was not error for the Alaska courts to conclude that there was a significant litigation risk that substantial trust land would be considered "sold" and not subject to recovery. *See* App. A-18-20. Nor would there be any decisional conflict for this Court to resolve even if the Alaska courts had adjudicated the issue, which they did not.

C. The Alaska courts properly weighed the litigation risks associated with the mismanagement claim; no federal question was adjudicated, and Weiss waived this issue.

1. Weiss next argues that the class's mismanagement claim was not properly valued in the court's settlement approval analysis.[13] He implies that an important federal question was adjudicated, claiming that the trust is entitled to mismanagement damages based on federal law,

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[13] His main complaint here seems to be that the court sustained evidentiary objections against him. Pet. 23-24.

and that the Alaska courts "foreclose[d] [that claim] after acknowledging that it had not been the subject of factual or legal development." Pet. 24.

No federal question was adjudicated. The Alaska courts did not rule that the class had no viable mismanagement claim. Instead, they properly weighed the class's likelihood of recovering damages for that claim against the benefits offered in the settlement. *See* App. A-27-30; C-63-65, 65-70. Weiss simply misapprehends the legal and evidentiary distinction between establishing liability on one hand and recovering damages on the other.[14]

2. Further, Weiss waived this issue by opining to the court and class below that the mismanagement claim is weak because "it would be very difficult to prove what should have been earned." App. C-64 n.74.

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[14] For example, the alleged mismanagement damages were based largely on mineral values that the trial court predicted would be found to be grossly overstated. *See* App. A-28-30. Also, under Alaska law, a damages award cannot be based on speculation. "There is a substantial risk that the plaintiffs would be left with speculative damages for which they could be awarded nothing." App. A-28; C-65; *see also Ben Lomond, Inc. v. Schwartz*, 915 P.2d 632, 637 (Alaska 1996) (evidence must afford sufficient data from which court or jury may properly estimate amount of damages; such data must be established by facts rather than mere conclusions of witnesses).

D. The judgment of the Alaska courts is consonant with the AMHEA; Weiss raises issues that are not ripe and that he waived below.

1. Weiss claims that the settlement violates the AMHEA in two ways: (1) that the trust land management provided for under the settlement "violates the duty of undivided loyalty;" and (2) that the settlement allows income to be spent "on purposes not authorized by Congress." Pet. 24. Weiss mischaracterizes the settlement and raises questions that are not ripe and on which he took a contrary position below.

2a. Even if the settlement lacked the undivided loyalty management standard as Weiss claims, and it does not, the issue would not be ripe. No complaint has been filed, nor any decision rendered below, even suggesting that those charged with managing trust land under the settlement have acted with divided loyalty.

b. Moreover, the settlement requires that lands "be managed consistent with the trust principles imposed" by the AMHEA. Alaska Stat. § 38.05.801(a). The settlement legislation required promulgation of regulations governing the management of mental health trust lands. Alaska Stat. § 38.05.801(c). These regulations expressly require management with undivided loyalty to the trust:

> Trust land shall be managed consistently with trust responsibilities accepted by the state under the [AMHEA], ***which means that management shall be conducted solely in the best interest of the Alaska mental health trust and its beneficiaries.***

11 Alaska Admin. Code 99.020(b) (emphasis added).

Thus, the settlement provides the very management standard that Weiss claims is lacking. There is no divided loyalty.

3a. Weiss also alleges that *Weiss II* erroneously allows trust monies to be spent in contravention of the AMHEA. He claims that the class definition improperly adds, or permits the addition of beneficiaries, and thereby "dilutes the interests of the beneficiaries designated by Congress." Pet. 25-27.

b. Weiss waived any claim that the class definition is improper. ***He*** filed a joint motion to amend the class certification, asking for the very class definition that he now claims is improper. He asked the court to amend the class certification to read, in relevant part:

> all persons who are residents of the State of Alaska and are:
>
> . . .
>
> (ii) mentally defective or retarded;
>
> . . . [or]
>
> (v) other persons needing mental health services as the legislature may properly determine should be beneficiaries of the trust created under [the AMHEA].

Exc. 1081-1082.

The stated purpose of the motion was "to make the class coextensive with the beneficiaries of the Trust." *Id.* Weiss filed the motion with his motion for preliminary approval of the proposed chapter 66 settlement. That settlement included statutory changes to improve the funding and delivery of mental health services. One such

change is codified at Alaska Stat. § 47.30.056. In his motion for preliminary approval of the chapter 66 settlement, Weiss highlighted Alaska Stat. § 47.30.056. He lauded its requirement that trust monies be spent to "provide a reasonable level of necessary services to . . . (2) the mentally defective and retarded; . . . and (5) other persons needing mental health services as the legislature may determine." R. 736. Weiss summed up the mental health program funding scheme established in Alaska Stat. § 47.30.056 as follows:

> This is a critical element in the proposed settlement that assures those in most need ***and those for whom the Trust was initially created are actually benefited by the Trust.*** This provision tracks this court's [1988 Order: App. D], ***and was agreed to by virtually all of the interested groups, including all of the Plaintiff groups, the Alaska Mental Health Board, and the Department of Health and Social Services.***
>
> AS 47.30.056 (d)-(g) . . . establish the conditions (mental disorders) that qualify for treatment using trust funds and also establish treatment priorities. These provisions can be updated to keep pace with advances in scientific knowledge and professional practice. ***Again, these provisions were agreed to by all of the interested parties and groups.***

R. 737 (emphasis added). In reply to opposition to his motion for preliminary approval, Weiss assured the court that "everything in the proposed settlement is constitutional or otherwise legal. . . . " R. 12030.

Alaska Stat. § 47.30.056, the very statutory provision that Weiss lauded above, and that contains the same

class/beneficiary definition and funding scheme that Weiss now claims is illegal, is part of the HB 201 settlement.

c. Weiss's allegation that the class definition violates federal law by permitting the legislature to "add to the beneficiaries specified by Congress," Pet. 25, is also not ripe. There has been no claim nor any decision below suggesting that the legislature has added any beneficiaries to the State's mental health program that would not fit within those intended by Congress to benefit from the AMHEA.

4a. Similarly, Weiss's claim that the approved settlement allows trust fund expenditures outside of those provided for in the AMHEA is also neither preserved nor ripe. As shown above, the HB 201 settlement contains the same statutory provision, Alaska Stat. § 47.30.056, that details how necessary services are to be prioritized and funded. According to Weiss, everyone involved or interested in this case approved of these terms. He told the court below that the service funding scheme was "legal."

b. Further, the HB 201 settlement contains an overarching restriction that ensures spending in compliance with the AMHEA. Alaska Stat. § 37.14.009(a)(1) imposes a fiduciary obligation on the Trust Authority to "ensure that the assets of the trust are managed consistent with the requirements of the [AMHEA]." This management mandate clearly encompasses spending of trust income. There is nothing in the record of this case, nor anywhere else, indicating that the Trust Authority has failed to meet this standard. Weiss presents nothing worthy of this Court's review.

E. The class received full due process and more than adequate representation. Weiss waived the issues he now raises, and no conflict is presented.

Weiss asserts that the class was denied due process. His is a construct of erroneous assumptions: the set-off, resulting solely from the original class counsel's inadequate representation, created the risk that the class would obtain no monetary recovery in litigation, which in turn drove settling counsel to support the HB 201 settlement, which they would not have done if they had adequately evaluated the class's mismanagement claim. Pet. 27-30.

1. As shown above, the set-off was a significant litigation risk as a matter of law, based on the express terms of the AMHEA and general trust principles. Second, original class counsel left this case in 1985. In the twelve years since then, no other plaintiff's counsel has taken any action to challenge the set-off provided for in the 1985 *Weiss I* decision.[15] Moreover, the HB 201 settlement does not include the set-off.

2. Weiss waived any claim that settling counsel failed to adequately assess the class's mismanagement claim by

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[15] New class counsel was substituted three days after *Weiss I* was published and was granted an extension of time to decide whether to petition the Alaska Supreme Court for rehearing. He did not challenge the court's decision. Current class counsel replaced him in April 1986. App. C-9 n.8. He never sought relief from the set-off judgment, either. Counsel of record for Petitioners sought intervention in part to challenge the set-off provided for in *Weiss I*. R. 6866. He made no such challenge. Instead, he later declared that he and his clients were generally satisfied with *Weiss I*. App. A-29.

his own assessment of it. In 1993, he urged the court to approve and the class to support the chapter 66 settlement, despite the mismanagement claim that he now contends is worth billions. He told the court:

> The Plaintiffs have also argued that before taking the setoff [sic] the court should consider what the Trust should have earned if it had been properly managed (lost opportunities). While Plaintiffs' [sic] believe this is the correct result, ***it involves problems of proof and results in a level of complexity approaching and even possibly exceeding the title challenges to the approximately 6,000 third party interests.***

R. 730 (emphasis added). Weiss advised the class that "[e]ven if Plaintiffs were able to establish the [mismanagement] principle, it would be very difficult to prove what should have been earned." App. C-64 n.74.

Weiss was correct. Neither settling counsel nor the Alaska courts erred in placing little litigation value on the mismanagement claim. There was no due process violation.

3a. Finally, Weiss argues that *certiorari* should be granted so the Court can "enunciate a due process standard for the adequacy of class counsel's representation." Pet. 30. He suggests a conflict between the Alaska Supreme Court and the Third and Seventh Circuits. *Id.* at 29. There is no conflict. The cases relied on by Weiss and the Alaska courts are in agreement that a trial court should consider whether a proposed settlement is the result of adequate representation.

b. What the *Weiss II* court rejected was Weiss's argument that a settlement approval must be reversed if the

trial court merely fails to express the incantation that "representation was adequate." There is no authority nor reason for the *per se* rule Weiss now desires. App. A-41 n.30; *cf. In re General Motors Engine Interchange Litig.*, 594 F.2d 1106, 1133 (7th Cir. 1979), *cert. denied*, 444 U.S. 870 (1979) (declining to adopt *per se* rules rigidly confining trial court's exercise of discretion in supervision of class actions).

c. Moreover, Weiss did not preserve the issue he now advances. He did not raise it before the trial court. Indeed, Weiss advocated for the very standard on adequacy of representation employed by the trial court, *i.e.*, whether the proposed settlement is "the product of serious, informed, non-collusive negotiations." R. 719, 20670-20671. Weiss would elevate form over substance, inviting absurd results. He would have a settlement that compares favorably with the likely results of litigation and is demonstrably in the best interest of the class reversed for want of an incantation that "representation was adequate," even when the record clearly supports that precise finding. App. A-41-42 n.30. This is not the standard in any Circuit nor should it be a standard mandated by this Court.

d. In this case the trial court carefully considered whether representation by settling plaintiffs' counsel was adequate. Much of the preliminary approval briefing and hearing was devoted to that question, as was a significant portion of the court's lengthy decision granting preliminary approval. *See* R. App. 23-30. The court concluded that "the proposed settlement is the product of serious, informed, noncollusive negotiations." *Id.* at 30. In granting final approval the trial court stated:

> [C]ounsel for the class supporting the settlement . . . had sufficient experience and knowledge and access to knowledgeable staff[16] to represent the class adequately.
>
> . . . .
>
> The court concludes that plaintiffs' attorneys had sufficient information, under the circumstances, with which to negotiate this settlement and evaluate the difficulties of obtaining full relief at trial. The court also finds that the information presented to the court during the preliminary and final approval process has been adequate for the court's evaluation of the settlement and risks of continued litigation.

App. C-89, 91. By even the most inflated notions of due process, the Alaska courts' findings are more than sufficient.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

BRUCE M. BOTELHO*
Attorney General

NATHANIEL B. ATWOOD
Assistant Attorney General

*Counsel of Record

[16] The court was referring here to Weiss's land staff.

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

VERN T. WEISS, father and next friend of CARL WEISS, a minor child, and EARL HILLIKER, on behalf of themselves and all others similarly situated; the ALASKA MENTAL HEALTH ASSOCIATION, MARY C. NANUWAK and JOHN MARTIN, on behalf of themselves and all others similarly situated; ANITA BOSEL, FRANCES DOULIN, SHARON GOODWIN, and GABRIEL MAYOC; and H.L., M.K., and ALASKA ADDICTION REHABILITATION SERVICES,

Plaintiffs,

vs.

STATE OF ALASKA,

Defendant.

(Filed July 29, 1994)

Case No. 4FA-82-2208 Civil

MEMORANDUM DECISION AND ORDER RE: PRELIMINARY APPROVAL OF HB 201 PROPOSED SETTLEMENT AGREEMENT

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I. INTRODUCTION

Two motions for preliminary approval of a new proposed settlement agreement, filed June 10, 1994, are

before the court. The court held in evidentiary hearing and oral argument on July 12-22, 1994, regarding whether the proposed settlement should be preliminarily approved. Plaintiffs Anita Bosel, Frances Doulin, Sharon Goodwin, and Gabriel Mayoc ("Bosel"), H.L., M.K., and Alaska Addiction Rehabilitation Services ["H.L."] and defendant State of Alaska ["State"] urge the court to grant preliminary approval of the proposed settlement. Plaintiffs Vern Weiss and Earl Hilliker ["Weiss"], and the Alaska Mental Health Association, Mary C. Nanuwak, and John Martin ("AMHA") oppose preliminary approval of the settlement.

Alaska Center for the Environment, Alaska Sportfishing Association, Lynn Canal Conservation, Northern Alaska Environmental Center, Sierra Club, Southeast Alaska Conservation Council, Susitna Valley Association, and Trout Unlimited ["Public Interest Intervenors"] filed a memorandum supporting the proposed settlement. Marathon Oil Company and Union Oil Company of California ["Oil Company Intervenors"] also filed a response supporting preliminary approval of the proposed settlement.

II. BACKGROUND

This class action began in November 1982, with allegations that the State had breached its obligations to the beneficiaries of the mental health lands trust.

The mental health lands trust was created by Congress in the Alaska Mental Health Enabling Act of 1956 ["Enabling Act"]. Pub. L. No. 84-830, 70 Stat. 709 (1956). The Enabling Act transferred responsibility for mental

health programs from the federal government to the Territory of Alaska and granted one million acres of land to the Territory to aid in the financial support of a comprehensive mental health program.[1] Pub. L.No. 84-830, §§ 101, 202, 70 Stat. 709 (1956). Section 202(e) stated:

> All lands granted to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any dispositions thereof, shall be administered by the Territory of Alaska as a public trust and such proceeds and income shall first be applied to meet the necessary expenses of the mental health program of Alaska. Such lands, income, and proceeds shall be managed and utilized in such manner as the Legislature of Alaska may provide. Such lands, together with any property acquired in exchange therefor or acquired out of the income or proceeds therefrom, may be disposed of in such a manner as the Legislature of Alaska may provide, in order to obtain funds or other property to be invested, expended, or used by the Territory of Alaska. The authority of the Legislature of Alaska under this subsection shall be exercised in a manner compatible with the conditions and requirements imposed by other provisions of this Act.

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[1] In 1956 no mental health program existed in Alaska; the federal government transported mentally ill and mentally retarded people in need of hospitalization to the Morningside Hospital in Portland, Oregon. The history surrounding passage of the Enabling Act was discussed in the court's Memorandum Decision and Order of April 27, 1988, which analyzed congressional intent regarding the beneficiaries of the trust.

Section 6(k) of the Alaska Statehood Act confirmed and transferred the mental health trust to the State. Pub. L. No. 85-508, § 6(k), 72 Stat. 339 (1958).

The State of Alaska managed the mental health lands without maintaining separate accounting for the trust. In the 1970's there was pressure on the legislature to convey state-owned land to private individuals and municipalities. Because the mental health trust lands were some of the first land parcels to be selected by Alaska, trust lands were among the most attractive state lands for both private development and public purposes. In 1978, the legislature removed mental health lands from trust status and redesignated them as general grant lands.[2] Ch. 181, § 3(a), SLA 1978. A percentage of all State land revenue was to be paid to the mental health trust fund to compensate the trust, but no money was ever appropriated by the legislature to the fund. *See* Ch. 181 § 4, SLA 1978.

The State proceeded to transfer large amounts of original trust land after the redesignation legislation. A large amount of original mental health trust land was set aside for public purposes such as parks, recreation, and wildlife habitat. Much of the trust land located within municipal boundaries was transferred to municipalities, who later sold some land to private individuals. Many of the trust lands most suitable for development were sold to private individuals through the State's land sale programs. Overall, up to 50,000 acres were conveyed to

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[2] State general grant lands are those granted to Alaska through subsections (a) and (b) of Section 6 in the Alaska Statehood Act. Pub. L. No. 85-508, § 6(a) and (b), 72 Stat. 339 (1958).

private individuals, over 40,000 acres were conveyed to municipalities, and over 350,000 acres were placed in legislatively designated areas[3] such as state forests, parks, and wildlife areas. Only about 35-40% of the original one million acres of trust land remain unencumbered and in unfettered state ownership.

Weiss and Hilliker, the original named plaintiffs, filed this lawsuit as a class action on November 26, 1982. They claimed that the State breached the trust by failing to account for trust revenues, using the revenue from trust lands for purposes other than mental health services, and redesignating trust lands as general grant lands. In January 1983, the suit was certified as a class action, and the class was defined as "all persons who are residents of the State of Alaska and who will require mental health services in the future which are not available in the State of Alaska."[4] *Weiss v. State*, 4FA-82-2208, Order Certifying Action (Super. Ct. Jan. 26, 1983) (Judge Taylor). AMHA intervened in 1986 and added claims that

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[3] Legislatively designated areas are lands designated by law as a state park, state forest, state game refuge, state wildlife refuge, state game sanctuary, state recreational area, state recreational river, state wilderness park, state marine park, state special management area, state public use area, critical habitat area, bald eagle preserve, bison range, or moose range. *See* Ch. 66, §§ 54(6), 55(b), SLA 1991.

[4] The beneficiaries of the trust are composed of at least "those individuals suffering from psychiatric illness who may require hospitalization and the mentally defective and retarded" as well as "chronic alcoholics suffering from psychoses and senile people who as a result of their senility suffer major mental illness." Memorandum Decision and Order, at 17 (April 27, 1988).

the conveyances of trust land to third parties were invalid. In March 1987, Bosel intervened to represent mental defective and mentally retarded individuals. N.L. intervened in June 1987 to represent chronic alcoholics.

In October 1985, the Alaska Supreme Court upheld the superior court's finding that the State breached its trustee obligations under the mental health land trust. *State v. Weiss*, 706 P.2d 681, 684 (Alaska 1985). The Supreme Court also invalidated the 1978 legislation redesignating mental health trust lands as general grant lands and held that, to the extent possible, the trust should be returned to its position prior to the legislation.[5]

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[5] Specifically, the Supreme Court stated:

> It follows from our conclusion that the redesignation legislation is invalid that the trust must be reconstituted to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective. The case is remanded so that requisite findings can be made. We take this opportunity to provide some guidance to the trial court to simplify its task.
>
> Those general grant lands which were once mental health lands will return to their former trust status. In the event exchanges have been made, those properties which can be traced to an exchange involving mental health lands will also be included in the trust. To the extent that former mental health lands have been sold since the date of the conveyance the trust must be reimbursed for the fair market value at the time of sale. In calculating the total amount owed, the trial court should grant a set-off for mental health expenditures made by the state during the same period. In the event that expenditures exceeded the value of the lands sold, the state need not furnish cash as part of the reconstitution. The goal is to

The court specifically declined to rule on questions regarding the title to mental health lands held by third parties.[6] *See Weiss*, 706 P.2d at 684 n.4.

The parties have struggled to agree on an adequate remedy since the Supreme Court decision. Major attempts at settlement were made through legislation in 1987 (Chapter 48), 1990 (Chapter 210), and 1991 (Chapter 66). None of these proposed settlements has obtained preliminary approval.

Chapter 48 involved the concept of the State "renting" mental health lands from the trust. The trust was to be reconstituted entirely with land within legislatively-

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> restore the trust to its position just prior to the conveyance effected by the redesignation legislation.

State v. Weiss, 706 P.2d 681, 684 (Alaska 1985).

[6] This issue was raised in AMHA's complaint after the Supreme court's decision. The plaintiffs and the State disagree on which trust lands have been "sold" within the meaning of the court's opinion. The State contends that any disposition, even designation as a park, means the land has been "sold." Plaintiffs have argued that the term "sold" applies only to land conveyed to bona fide purchasers, which of course would not include municipalities. They contend that this lawsuit was sufficiently well-known that all or nearly all purchasers had at least constructive notice of the trust's interest and the State's breach of trust. *See* Settling Plaintiffs' Memo. Supporting Motion for Preliminary Approval, at 8 (July 1, 1992). Since it is possible that the amount of the State's past mental health expenditures exceed the value of "sold" trust land, it is possible that the trust would not receive any cash reimbursement even if substantial amounts of land were "sold." It is in the interest of the State to maximize the amount of lands "sold" and the amount of past mental health expenditures. It is in the interest of the trust to minimize both categories.

designated areas and the original trust lands not in legislatively-designated areas were to be released from trust status. The reconstituted trust was to have the same fair market value as the original one million acres of mental health lands. The State was to compensate the trust by "renting" the reconstituted trust lands at an annual amount of eight percent of the fair market value of trust lands with the value of the lands to be redetermined every five years. Until fair market value of the lands was established, five percent of the State's unrestricted general fund revenues was deemed to be the income of the trust. Chapter 48 also created an Alaska Mental Health Board to determine the needs of the mental health program and transmit funding recommendations to the governor and legislature.

Chapter 48 failed as a possible settlement because the parties could not determine fair market value of the trust lands. The fair market value of trust lands was estimated according to procedures approved by the Interim Mental Health Trust Commission[7] at $2.243 billion. The State considered this figure much too high. The Commissioner of the Department of Natural Resources wrote to the Alaska Mental Health Board on April 17, 1990, announcing that the department would not follow the procedures. Impasse resulted.

The legislature then enacted a different settlement proposal in Chapter 210, which eliminated the need for a

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[7] The Interim Mental Health Trust Commission was originally established under chapter 132, SLA 1986.

land value determination. Chapter 210 provided for compensation to the trust in the amount of six percent of the State's unrestricted general revenues. Plaintiffs rejected this proposal because State revenues were expected to fall to a level at which the trust was unlikely to receive fair compensation for the value of trust lands. The court held that the legislature could not settle the lawsuit unilaterally with such legislation, particularly in view of the Supreme Court's mandate to reconstitute the trust "to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective." Memorandum Decision and Order, at 8-9 (July 9, 1990).

Plaintiffs obtained an injunction prohibiting the State from taking any further action on mental health lands. *See* Memorandum Decision and Order (July 9, 1990). The plaintiffs also filed lis pendens on all original mental health lands. Around 6,000 land transactions were affected by the injunction and/or lis pendens. This placed many purchasers of small parcels in a difficult position: they made all of their payments to the State for land purchased in a state land sale, but were still unable to obtain patent to the land. Because of the cloud on their title, many of these individual purchasers have found themselves unable to sell the land or obtain financing for construction. Certain developments on state land, such as mining operations, also have been delayed due to the uncertainty of title.

In May 1991, after negotiations between the State and class counsel, the Alaska Legislature passed Chapter 66. The legislation contained amendments to the state's mental health program and established a process to select

land for an entirely land-based reconstitution of the mental health land trust. On April 6, 1992, a proposed settlement agreement, incorporating Chapter 66, was signed by the State and three of the four class counsel.[8] Because of H.L.'s allegations of improprieties during negotiations, an evidentiary hearing regarding settlement negotiations was held in September 1992, and continued in January 1993.

The legality of portions of Chapter 66 dealing with reconstitution of the mental health land trust was challenged by the Public Interest Intervenors. The portions of the Chapter 66 settlement affecting Cook Inlet oil and gas leases on state land were challenged by Marathon Oil Company and Union Oil Company of California ("Oil Company Intervenors"). The Public Interest Intervenors' challenge to Chapter 66 was addressed in the court's Memorandum Decision and Order regarding Public Interest Intervenors' Complaint (April 26, 1993). The Oil Company Intervenors' challenge to provisions in the proposed settlement which effected their oil and gas leases on state land in Cook Inlet was addressed in the court's Memorandum Decision and Order (May 14, 1993). Both decisions were appealed.[9]

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[8] Counsel for Bosel, Jeff Jessee, withdrew from the Chapter 66 settlement in December 1992.

[9] If this settlement is approved, the Oil Company Intervenors plan to file motions to the Alaska Supreme Court requesting dismissal of their appeals as moot and vacation of the orders on which the appeals are based. Response of Oil Company Intervenors, at 4 (July 1, 1994).

On October 4, 1993, the court denied a motion made by H.L. and Bosel for partial summary judgment and held that intervening plaintiff class members have the same status as original named plaintiffs and class members. If a settlement receives final approval, all members of the class will be bound by that decision.[10]

On December 30, 1993, the court refused to grant preliminary approval to the Chapter 66 settlement. *See* Memorandum Decision and Order, at 122 (Dec. 30, 1993). The court found that the proposed settlement had serious deficiencies because the agreement permitted any party to terminate the settlement agreement even after final approval and dismissal of this case. *See* Memorandum Decision and Order, at 121 (Dec. 30, 1993).

Negotiations of a new settlement started in January 1994. In a special session following the 1994 legislative session, HB 201 and HB 371 were passed amending Chapter 66 and establishing a new settlement.[11]

The HB 201 settlement includes more cash and less land than the Chapter 66 settlement. It is supported by the State, Bosel, and H.L. It is opposed by Weiss and

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[10] Of course class members who object to a settlement may appeal any decision granting final approval.

[11] HB 201 has became Chapter 5, FSS SLA 1994, and the accompanying appropriations bill, HB 371, became Chapter 6, FSS SLA 1994, after Governor Hickel signed the bills on June 23, 1994. Because the settlement legislation has been called "HB 201" in most of the documents submitted to the court, this memorandum will continue to use the terms "HB 201" and "HB 371."

AMHA. The settlement is supported by the Public Interest Intervenors, who participated in negotiations concerning land to be included in the reconstituted trust. The Oil Company Intervenors support HB 201, but declined to sign the settlement agreement due to a disagreement with the State over provisions relating to attorneys' fees.[12]

The HB 201 settlement is summarized below. Additional information regarding the settlement and the negotiation process will be discussed as it relates to specific issues raised by the factors the court must consider in making the preliminary approval decision.

III. SUMMARY OF THE PROPOSED SETTLEMENT

The settlement components of HB 201 are contained in sections 2 through 9, 12 through 41, 43, 46, 47, 50, and 51. A proposed settlement agreement submitted with H.L.'s Motion for Preliminary Approval has been signed by the State, H.L., and Bosel. Settlement Agreement and Stipulation to Terms of Dismissal (June 10, 1994). HB 201 to a great extent incorporated the Chapter 66 provisions that are designed to improve the mental health program for beneficiaries, but section 39 of HB 201 repeals the trust reconstitution provisions of Chapter 66. HB 201

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[12] The Oil Company Intervenors do not support Section VI, paragraph 4 of the settlement, which states:

> Attorney fees and costs shall be awarded and paid as determined by the court. Paragraph 6(e) requires dismissal of appeals to the Supreme Court because they are moot. The parties request that attorney fees be awarded as if the orders had not been appealed.

Oil Company Intervenors' Response, at 3-4 (July 1, 1994).

reconstituted the trust with a specific land package and a $200 million cash payment. Most of the settlement terms become effective only if this action is dismissed and any appeals are resolved by December 15, 1994.[13] HB 201 §§ 37.

Chapter 66 was a "process" settlement, which set guidelines for choosing the lands for return to the trust; HB 201 is a "product" settlement with lands already selected and a definite amount of money ($200 million) appropriated in HB 371 for the trust fund.[14] Section 40(a) of HB 201 returns approximately 568,000 acres of original trust land to the reconstituted trust and designates approximately 353,000 acres of other state land as substitute trust land to replace original trust land that will not be returned to the trust. The original trust land to be reconstituted into the trust includes approximately 435,000 acres in fee, approximately 55,000 acres of mineral estate, and approximately 78,500 acres of oil and gas interests. *See* Aff. Harry A. Noah (State M/Prelim. Appr., at 3 n.4, Exh. A). Lands returned to the trust will include only the mineral estate or oil and gas interests where the surface has been conveyed to third parties or is within

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[13] The governor may extend the deadline for up to 45 additional days. HB 201 § 47.

[14] Section 1 of HB 371 provides that the Mental Health Trust Fund, established by section 12 of HB 201, is funded by: (1) $33 million from the existing mental health trust income account; (2) $11.7 million from the Department of Natural Resources (DNR) trust income account in the general fund; (3) $25 million from sale of DNR land sale contracts; and (4) $130.3 million from the constitutional budget reserve fund.

legislatively designated areas such as the Matanuska Valley Moose Range. H.L. and Bosel Mem. Sup. M/Prelim. Appr., at 5 (June 10, 1994). Other state land to be transferred includes 111,000 acres in fee,[15] 217,000 acres of mineral estate,[16] and approximately 25,000 acres of oil and gas interests.[17] *See* Aff. Harry A. Noah (State M/Prelim. Appr., at 3 n.5, Exh. A).

The reconstituted land trust will consist of a total of 930,000 acres, the value of which is estimated by H.L. and Bosel to be between $1.0 and $1.1 billion. H.L. and Bosel Mem. Sup. M/Prelim. Appr., at 2, 4, 6-7 (June 10, 1994). Weiss and AMHA estimate the value of the lands to be $560 million. Weiss Opp. to Prelim. Appr., at 6 (July 1, 1994).

A mental health trust fund will be established to receive revenues attributable to the principal of the trust. HB 201 §§ 12-14. As compensation for the original trust lands not returned to the trust, the fund will start with

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[15] Of this "other state land" to be conveyed in fee, approximately 41,000 acres was selected for its surface value, 4,252 acres for timber value, and approximately 65,000 acres for its mineral potential, including approximately 9,077 acres adjacent to the Fort Knox mining project. H.L. M/Prelim. Appr., at 6.

[16] Approximately 116,000 acres of this land is located near Salcha and has been selected by the state but not tentatively approved by the federal government. It is part of a military withdrawal. Unless the military withdrawal is released, it is not likely that this land could be conveyed to the trust in the foreseeable future.

[17] The oil and gas interests are located in the lower Kenai peninsula and lower Susitna Valley.

the $200 million cash payment appropriated in HB 371. The Alaska Permanent Fund Corporation will manage the trust fund. HB 201 §§ 3, 4. HB 201 provides that the "cash principal of the mental health trust fund shall be retained perpetually in the fund for investment by the Alaska Permanent Fund Corporation." HB 201 § 14 (to be codified as AS 37.14.035(a)).

Earnings from the trust fund along with trust land revenues not attributable to principal will be deposited in a mental health trust income account.[18] HB 201 §§ 3, 14, 15. The income account will be administered by the Alaska Mental Health Trust Authority.[19] HB 201 § 16 (to be codified as AS 37.14.039(a)). Money in the trust income account may be used by the Trust Authority for: (1) awarding grants and contracts to ensure an integrated comprehensive mental health program for the state;[20] (2)

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[18] At the end of each fiscal year, the Alaska Permanent Fund Corporation must transfer the net income of the trust fund to the mental health trust income account. HB 201 § 14 (to be codified at AS 37.14.035(b)). In addition, money deposited prior to December 15 in the existing mental health trust income and proceeds account will be deposited in either the income account or trust fund established by HB 201. Settlement Agreement, art. V, sec. 5 (June 10, 1994).

[19] The Alaska Mental Health Trust Authority is created by section 26 of Chapter 66, SLA 1991. A seven-person board of trustees will govern the Trust Authority. Ch. 66 § 26, SLA 1991. Board members must be appointed by the governor and confirmed by the legislature. HB 201 § 24. The board has the duty to preserve and protect the trust corpus under AS 37.14.009, which is added by section 10 of Chapter 66 and amended by section 9 of HB 201.

[20] Section 16 of HB 201 also adds AS 37.14.045, which specifies the terms under which grants and contracts may be added.

obtaining private and federal grants for the above purpose; (3) soliciting gifts, bequests, and contributions for the above purpose; (4) reimbursing the Alaska Permanent Fund Corporation and DNR for the cost of managing trust assets; (5) offsetting the effects of inflation on the trust fund; and (6) meeting the necessary administrative expenses of the Trust Authority. HB 201 § 16 (to be codified as AS 37.14.041(a) and AS 37.14.045). The proposed settlement agreement states directly that the Trust Authority may use the money in the trust income account for these purposes without further legislative appropriation.[21] Settlement Agreement, art. V, sec. 4, at 12 (June 10, 1994). If money in the income account is not needed for the necessary expenses of the state's mental health program, the Trust Authority is required to transfer the money to the unrestricted general fund for other purposes.[22] HB 201 § 16 (to be codified as AS 37.14.041(b).

The governor is required to submit to the legislature a separate appropriations bill limited to the state's integrated comprehensive mental health program and similarly the legislature is required to make appropriations for the mental health program in a separate bill. HB 201 §§ 4, 7. The bill must be accompanied by a report explaining the differences between the appropriations proposed by the governor and the Trust Authority's recommendations for expenditures from the general fund for the state's mental health program. HB 201 § 5. HB 201 also

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[21] It is not known whether this is permissible under the Alaska Constitution.

[22] Such a transfer is permitted by the Enabling Act. P.L. 84-830, § 202(e), 70 Stat. 709 (1956).

provides that if the governor vetoes any appropriations for the mental health program, the governor's veto message must explain the vetoes in light of the Trust Authority's recommendations for expenditures from the general fund for the mental health program. HB 201 § 6.

Under HB 201, the reconstituted land corpus of the trust will be managed by the Department of Natural Resources ("DNR"). HB 201 § 17. Section 17 of HB 201 describes the standards applicable to DNR's management of trust lands:

> (a) Mental health trust land shall be managed consistent with the trust principles imposed on the state by the Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (1956).
>
> (b) Subject to (a) of this section, the department
>
> (1) shall manage mental health trust land under those provisions of law applicable to other state land;
>
> (2) may exchange other state land for mental health trust land under the procedures set out in AS 38.50;
>
> (3) may correct errors or omissions in the legal descriptions of mental health trust land.
>
> (c) The commissioner shall adopt regulations under AS 44.62 (Administrative Procedure Act) to implement this section. The regulations adopted under this subsection must, at a minimum, address

(1) maintenance of the trust land base;

(2) management for the benefit of the trust;

(3) management for long-term sustained yield of products from the land; and

(4) management for multiple use of trust land.

Thus, to the extent that trust principles imposed by the Enabling Act do not conflict, general state land law will apply. The regulations which are to be adopted must address the four listed management provisions.[23] HB 201 requires that a separate unit of DNR be established whose responsibility is to manage the trust land.[24] HB 201 § 22. The land management provisions in sections 17-18 and 22 take effect immediately and remain in effect whether or not the settlement is approved by the December 15 deadline. *See* HB 201 §§ 17, 22, 48, 52.

HB 201 purports to confirm and ratify the 1978 redesignation of original trust lands not returned to the reconstituted trust. *See* HB 201 § 41. HB 201 also provides

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[23] These four management principles are derived from a monograph entitled "The School Trust Lands: A Fresh Look at Conventional Wisdom" by Fairfax, Souder, and Goldenman. Exh. B (evidentiary hearing). The article is published at 22 Environmental Law 797.

[24] The proposed settlement agreement requires that during the development of the initial policies and procedures for the separate DNR unit managing trust land, DNR will consult with a transition team of representatives from the beneficiary community. Settlement Agreement, art. V, § 6, at 13-14 (June 10, 1994). Commissioner Noah testified that he is doing so.

the legislature's estimate of the amount for past mental health expenditures. HB 201 § 42.[25]

The improvements to Alaska's mental health program enacted under Chapter 66 are made effective by the settlement provisions of HB 201 with only a few amendments. *See* HB 201 §§ 19-21, 30-36, 37; Ch. 66 § 26-48. The program portion of the Chapter 66 settlement has involved little controversy; most regard the program portion as a valuable addition to state law.

IV. STANDARD FOR PRELIMINARY APPROVAL

Under Alaska Civil Rule 23(e), a "class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Alaska R. Civ. P. 23(e). Because the Alaska rule is identical to the federal rule, federal cases may provide guidance in its application to the present case. *See State v. Alex*, 646 P.2d 203, 213 (Alaska 1982). The settlement approval process in class actions is composed of four parts: (1) preliminary approval of the settlement by the court; (2) notice to the class; (3) a formal fairness hearing; and (4) final approval by the court. *See Manual for Complex Litigation, Second* § 30.43, at 241 (West 1985) ["*MCL 2d*]". The primary purpose behind court approval of the settlement of a class action is the protection of class members "whose

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[25] This provision becomes important only if this attempt at settlement does not succeed.

rights may not have been given due regard by the negotiating parties." *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 624 (9th Cir. 1982).

The standard for preliminary approval includes an inquiry into both the fairness and the adequacy of the proposed settlement. *In re Mid-Atlantic Toyota Antitrust Litigation*, 564 F. Supp. 1379, 1383 (D. Md. 1983). The court must make a preliminary evaluation of the fairness of the proposed settlement agreement by considering whether the proposed settlement:

(1) appears to be the product of serious, informed, noncollusive negotiations;

(2) has no serious deficiencies;

(3) does not improperly grant preferential treatment to class representatives or segments of the class; and

(4) falls within the range of possible approval.

MCL 2d § 30.44, at 241. Preliminary approval is not a finding that the settlement is actually fair, reasonable, and adequate.[26] *In re Mid-Atlantic Toyota Antitrust Litigation*, 564 F. Supp. 1379, 1384 (D. Md. 1983). Final approval of the settlement remains discretionary with the court even after preliminary approval. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992); *S.E.C. v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984); *Newberg on Class*

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[26] The settlement must be "fair, adequate, and reasonable" in order to receive final court approval. *E.g., Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992); *MCL 2d*, § 30.44, at 242 ("The settlement must be fair, reasonable, and adequate under the circumstances.").

Actions, Third Edition § 11.41, at 11-88 (3d ed. December 1992 & Supp. June 1993) [*"Newberg on Class Actions 3d"*]. The purpose of preliminary approval is to ascertain whether there is any reason to expend the time and money to notify class members of the proposed settlement and proceed with a formal fairness hearing. *Armstrong v. Board of School Directors*, 616 F.2d 305, 314 (7th Cir. 1980). Notice and a formal fairness hearing would be "futile gestures," if the court did not find the settlement to be within the range of possible approval.[27] *Newberg on Class Actions 3d* § 11.25, at 11-36; *see In re Mid-Atlantic Toyota Antitrust Litigation*, 564 F. Supp. 1379, 1384 (D. Md. 1983).

The court may only approve or disapprove a settlement agreement. *MCL 2d* § 30.41, at 237. The court may make suggestions for changes, but has no authority to directly amend a settlement. *See Id.* However, "[n]othing prevents the court from receiving successive settlement proposals or from submitting successive settlement proposals to the class for its evaluation." *Newberg on Class Actions 3d* § 11.25, at 11-37 to 11-38.

The burden is on the proponents to show that a proposed settlement should be approved. *See MCL 2d*

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[27] However, where a court rejects a settlement, it "may indicate what modifications would make the settlement acceptable to it." *Little Rock School District v. Pulaski County*, 921 F.2d 1371, 1388 (8th Cir. 1990). If changes for the proposed settlement are suggested in the court's decision, the parties may be able to agree on appropriate changes before notice is given to the class. *See MCL 2d*, § 30.41, at 237 n. 88. If substantial changes are made, the agreement may be resubmitted for preliminary approval, additional notice to the class, and another hearing. *Id.*

§ 30.44, at 241-42; *Newburg on Class Action, Third Edition* § 11.42, at 11-94 (1992).

V. DISCUSSION

A. Is the Proposed Settlement the Product of Serious, Informed, Noncollusive Negotiations?

1. Factual background

On December 30, 1993, the court denied motions for preliminary approval for the Chapter 66 settlement. As early as January 6, 1994, the State began exploring the possibility of a new settlement. After a January 25, 1994 meeting, Mr. Volland believed that a mixed land and cash settlement was possible.[28] Aff. Volland ¶ 6.

The State presented plaintiffs with an initial offer in mid-February. The plaintiff groups and third-party intervenors discussed the State's proposal several times. The State invited counterproposals from any of the plaintiff attorneys. On March 14, Mr. Volland submitted a counteroffer to the State that involved the formation of a permanent endowment fund for the state's mental health program. *See* Aff. Volland ¶ 14. Although Mr. Volland submitted the counteroffer on behalf of his clients alone, meetings with counsel and representatives for other plaintiff groups convinced him that the principles of his counteroffer were generally acceptable to plaintiff

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[28] The Chapter 66 settlement was a land-based settlement without any significant cash component. The State refused to consider a settlement with a large cash component during the negotiations which led to the enactment of Chapter 66.

groups. Aff. Volland, ¶¶ 14-16. Neither Mr. Walker nor Mr. Gottstein presented a counteroffer to the State.

Mr. Volland involved other interest groups in the negotiations. The Public Interest Intervenors played an active role in negotiating the contents of the list of lands to be included in the reconstituted trust under HB 201. Public Interest Intervenors' Response, at 4 (July 1, 1994). Representatives from the coal industry and oil and gas industry were also involved in the negotiation process. Mr. Volland sought to involve affected parties so that if a settlement was reached, it would be accepted broadly and would not suffer the attacks from non-parties which plagued the Chapter 66 settlement.

A series of meetings ensued among the State, plaintiffs' attorneys, and attorneys for third-party intervenors. *See* Aff. Volland, ¶¶ 16-19 (filed June 10, 1994); Aff. Harry Noah, ¶¶ 5-6 (filed June 10, 1994); Aff. Brian Bjorkquist, ¶ 7 (filed June 10, 1994). By March, negotiations over land focused on identifying lands from those which had been proposed as substitute lands during the Chapter 66 settlement implementation which would also satisfy the concerns of the Public Interest Intervenors. Aff. Volland, ¶ 16. Negotiations also dealt with the desire of Weiss and AMHA to expand the list of returnable original trust lands. *Id.*

Numerous meetings between the various parties occurred, primarily to negotiate land issues. *See* Aff. Volland, ¶¶ 18-20. On April 15, the State responded to the

counterproposal with additional changes, including management of trust land by DNR. Aff. Volland ¶ 20. Discussions during mid-April also appear to have frequently involved the cash endowment. Aff. Volland. ¶ 21-23.

Mr. Volland apparently interpreted a letter sent to him by Mr. Gottstein dated April 19th as supporting his counterproposal and authorizing him to pursue settlement on those terms. *See* Aff. Volland ¶ 21. On the other hand, Mr. Gottstein viewed the letter as confirming an actual agreement between plaintiffs' counsel made at a previous meeting. *See* Aff. Gottstein, at ¶ 9, Exh. A (filed July 1, 1994); H.L. M/Prelim. Appr., Exh. D (June 10, 1994).

On April 25, Mr. Volland attended a meeting with representatives of beneficiaries; they were generally supportive of the proposal with the exception of certain land management provisions. Aff. Volland ¶ 25. Around April 22, Mr. Walker and Mr. Gottstein announced they would not recommend the proposed settlement to their clients. Aff. Volland, ¶ 24.

Because all counsel for the plaintiffs did not agree to the basic terms of the settlement, the State was unwilling to completely abandon its pursuit of an independent legislative resolution of the litigation. Aff. Volland, ¶ 27. For this reason, HB 201 has different effective dates and conditions for the various provisions. As a result of efforts by counsel for Weiss and AMHA, last minute amendments to the bill included section 47, which permits the governor to extend the December 15th deadline by 45 days if the extension is made by November 30, 1994.

Between late January and the final negotiations for HB 201 in May, plaintiffs' counsel held several meetings with members of the mental health community to discuss the settlement proposal. Although not all settlement negotiation sessions were attended by all counsel, counsel for all plaintiffs and third parties were kept informed about negotiations and were invited to attend sessions appropriate to their interests. There have been no allegations of exclusion from negotiations.

2. Serious, informed, noncollusive negotiations

In order to warrant preliminary approval, settlement negotiations must be serious, informed, and noncollusive. *MCL 2d* § 30.44, at 241. Weiss and AMHA concede that "the negotiations were conducted seriously by all parties in the sense that everyone worked very hard at it" and H.L and Bosel "were earnest negotiators." Weiss Opp. to Prelim. Appr., at 8. However, Weiss and AMHA assert that this proposed settlement was not the product of serious, informed, noncollusive negotiations.

Weiss and AMHA assert that the negotiations were not serious because (1) Bosel and H.L. did not pay appropriate attention to detail, and (2) the State insisted on pursuing its legislation to attempt to improve its litigation position.[29] The court disagrees. The court finds that

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[29] HB 201 contains many provisions designed to assist the State in litigation. Section 1 contains a long list of legislative findings which essentially set out the State's litigation posture. The non-settlement provisions would reconstitute the mental health land trust with certain original mental health trust lands

Bosel and H.L. paid attention to detail. Mr. Volland carefully considered the proposals made by Mr. Walker and Mr. Gottstein. Except where he disagreed with the analysis, Mr. Volland actively attempted to include their suggestions in the ultimate product. He was not always successful. However, the essential characteristic of negotiation and settlement is that everyone makes some concessions and no one gets everything desired. The State's insistence on pursuing the non-settlement provisions of HB 201 does not mean the negotiations were not serious. When it was apparent that not all of the plaintiffs' attorneys were willing to enter into the agreement, the State recognized that final approval could be denied. The State went forward with its contingency plan. The State submitted the first settlement proposal in February and later responded to plaintiffs' counterproposal. While parts of the legislation obviously were intended to pressure plaintiffs to agree to a settlement and to discourage challenges to the settlement agreement and appeals from approval if obtained, this does not mean the State was not serious in negotiations.

Weiss and AMHA assert that attorneys for H.L. and Bosel were not sufficiently informed about land issues to the extent necessary to negotiate the complex land issues in the interest of the class. Weiss and AMHA assert that Mr. Gottstein is the most knowledgeable about land

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and substitute lands (the same lands as those in the settlement), and declare a set-off of $1.32 billion from 1978 to 1994. HB 201 §§ 40-42. If valid, the result of litigation would be reconstitution of the trust with the same lands contained in this settlement. There would be no other benefits to the class and no cash component for the fund.

issues among plaintiffs' attorneys. They argue that Mr. Volland and Mr. Jessee used improper valuation numbers in evaluating the proposal. They argue that it was error to include 116,000 acres in the Salcha area that has only been selected by the State and is subject to a military withdrawal. They argue that the failure to include favorable terms from the Chapter 66 settlement such as survey at state expense and warranty of title demonstrate that counsel were not sufficiently informed.

The court disagrees and finds that Mr. Volland and Mr. Jessee were sufficiently informed. It is true that they do not have the most experience in these land issues among plaintiffs' attorneys. However, they did not operate in a vacuum. They made extensive use of the expertise found in the Mental Health Trust Lands Project.[30] The vast majority of lands to be included in the reconstituted trust under this proposed settlement agreement were lands proposed for inclusion in the reconstituted trust under the Chapter 66 proposed settlement by Weiss and AMHA.[31] Moreover, all attorneys, including Mr. Gottstein, were involved in the negotiation of the land list for this proposed settlement. The questioned values were ones supplied by the Lands Project; they were not ones

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[30] The Mental Health Trust Lands Project was established by Mr. Walker and Mr. Gottstein for implementation of the Chapter 66 settlement. The Project had many land experts employed. It also contracted with other experts.

[31] Of the land types listed in Exhibit A (evidentiary hearing) to be in the trust only four categories were not substitute lands proposed by the Lands Project under Chapter 66 implementation. They total one percent of estimated value.

developed by Mr. Volland or Mr. Jessee. Finally, no agreement of this magnitude is perfect and in settlement no one gets everything desired. The court does not believe that any purported "errors" were the result of counsel not being informed.[32]

Counsel for Weiss and AMHA contend there are indications of collusion between the State and counsel for H.L. and Bosel. Weiss Opp. to Prelim. Appr., at 11. They

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[32] It is true that the inclusion of the 116,000 acre Salcha parcel is problematic. At least part of the problem was recognized in the proposed settlement agreement. The provision states:

> d. Replacement of Mineral Estate Only Parcel from "Other State Land To Be Designated as Mental Health Trust Land, April 28, 1994"
>
> The State and beneficiary plaintiffs who are parties to the Settlement Agreement shall by August 1, 1994, identify for purposes of replacing land, an area of mineral estate only land at least equal in acreage and at least equal in revenue generating capability (i.e. estimated mineral value) to the land to be replaced within portion(s) of the approximate 116,000 acre Salcha mineral estate only parcel F-82863 (with errors or omissions in the legal description, if any, corrected) listed in "Other State Land To Be Designated as Mental Health Trust Land, April 28, 1994" that are now known to be contaminated with or affected by hazardous substances, (i.e. the Stewart Creek Impact Zone, which is generally identified on the map attached as Exhibit 2), unless otherwise agreed to by the parties. The parties shall also attempt to minimize the impact, if any, the replacement of land may have on the development potential of the Salcha mineral estate only parcel F-82863.

Attachment B to Settlement Agreement, at 1 (June 10, 1994).

contend that counsel for H.L. and Bosel violated an agreement with counsel for Weiss and AMHA set out in Mr. Gottstein's letter of April 19. Aff. Walker, ¶¶ 132-34 and Exh. 36 (filed July 1, 1994). They assert that counsel for H.L. and Bosel gave up the requirement of adequate funding from the general fund for the mental health program and then negotiated away the "endowment concept" for the trust. They assert that supporting legislation with the December 15 deadline is collusive, especially in light of the known constitutional issue regarding the Trust Authority's ability to spend the income of the trust without further legislative authorization.[33] They assert that the negotiation of a "confusing" agreement is further evidence of collusion.

The court disagrees and finds that the agreement is not the product of collusion. The court finds that the attorneys had legitimate disagreements over the interpretation of their April agreements. The court finds that counsel for Bosel and H.L. negotiated in good faith with the interests of the class in mind. Moreover, counsel for Weiss and AMHA were free to negotiate directly with the State throughout the process. There can be disagreement about the result, but the process was fair and non-collusive.

In summary, the court concludes that the proposed settlement is the product of serious, informed, noncollusive negotiations.

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[33] The point is that the deadline precludes testing the constitutionality of the Trust Authority's power in the Alaska Supreme Court.

B. Is the Proposed Settlement Without Serious Deficiencies?

Weiss and AMHA have raised seven points which they assert are serious deficiencies which should preclude preliminary approval: (1) termination by appeal; (2) unenforceability of the settlement; (3) indefinite terms; (4) invalidity of the land lists; (5) difficulties with DNR's work; (6) illegality of the management regime; and (7) lack of effective control by the Trust Authority. Each issue will be discussed.

The settlement provisions of HB 201 and HB 371 are effective only if the December 15 deadline is attained for dismissal of this action and the conclusion of all appeals. HB 201 §§ 37, 48-51. The proposed settlement agreement provides that if this court dismisses this action after final approval of the settlement, but the deadline is missed because of an appeal, any party can seek relief under Alaska Civil Rule 60(b)(6). Moreover, the parties have agreed that "the failure of the settlement provisions of HB 201 and HB 371 to become effective would justify seeking relief from judgment and no party shall oppose such a motion." Settlement Agreement, art. VI, sec. 7, at 17 (June 10, 1994). Weiss and AMHA argue that any party's ability to terminate the agreement by filing an appeal is a serious deficiency.

The court agrees that the effect of appeal on the settlement provisions is problematic. In essence, despite the investment of many hours and significant money by everyone in the approval process, any party can destroy the settlement by filing an appeal from a grant of final

approval.[34] Nevertheless, the court does not see this as a problem sufficient to warrant denial of preliminary approval. Although time and money will be wasted if the process fails because of a missed deadline, the claims of the class will not be adversely impacted. They will be in the same position that they would be if preliminary approval was denied. Moreover, if the settlement fails for this reason, it will be known soon – no later than the end of January 1995. The lost time should not adversely impact the class or its claims.

Weiss and AMHA's second point relates to the enforcement of the settlement. They question the enforceability of three aspects of settlement: (1) the "endowment concept";[35] (2) correction of land list problems; and (3) the payment of the $200 million to the trust, especially the $25 million designated to come from the sale of DNR's land sale contract portfolio [*see* HB 371 § 1(a)].

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[34] The parties favoring settlement informed the court at the evidentiary hearing that they are looking for a solution to the problem. However, the court doubts a solution can be found. Assuming the court issues and distributes a decision granting final approval on the date scheduled (November 15), a dissenter could wait until December 15 to file a notice of appeal. Even if the governor had opted for the permissible 45 day extension of the deadline, the Supreme Court would have only 45 days to act. There are few cases in the history of the state which have been decided within 45 days of the date the notice of appeal was filed.

[35] The court understands this term as used here to mean a Trust Authority with freedom to spend trust income without legislative approval.

It is true that there is no guarantee in this proposed settlement that the Trust Authority's power or, indeed, its existence will not be changed by a future legislature. It is important to focus on what remedy is provided if the legislature makes a material change in the provisions of HB 201 which create the Trust Authority. The portions of HB 201 which create the Trust Authority are incorporated into the proposed settlement agreement.[36] Settlement Agreement, art. I, sec. 1. If the legislative change was material, the class would be entitled to invoke the remedy found in art. VI, sec. 5: they would be free to file a new action asserting all the claims they have today.[37] While there are no guarantees, the fact that this litigation would begin anew should provide a reason for future legislatures not to act detrimentally to the class. There are risks associated with this which should be analyzed by the class; the court does not believe the risks are so great so as to require denial of preliminary approval.

Weiss and AMHA point out that there are known and identified problems with the land list to reconstitute the trust adopted by the legislature in HB 201. They assert that those problems can only be corrected with legislation. Since no one can say what the legislature will do, there are no guarantees that the changes will be made.

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[36] The Settlement Agreement does not use the word "incorporate." However, at the evidentiary hearing, the court ensured that incorporation was the intent of the agreement.

[37] The court ensured at oral argument that it was the State's intent that if there was a material change, the class would have all claims they have today and would be free to assert them.

The State acknowledges that some of the identified problems may require new legislation to correct.

Exhibit 2 to the Wareham affidavit (filed 7/1/94) lists many "errors and omissions" in the land lists on which the settlement is based. Some of the problems are serious, *e.g.*, the 116,000 acre parcel near Salcha which is not likely to be conveyed, other problems are insignificant, *e.g.*, listing a parcel on both the conveyable list and the non-conveyable list.[38] There are certainly a number of technical corrections which need to be made; it is possible that many will require new legislation. Some errors may be corrected under DNR's authority to exchange trust land with other state land and to "correct errors or omissions in the legal descriptions of mental health trust land." HB 201 § 17 (to be codified as AS 38.05.801(b)(2) and (3)).[39]

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[38] The court views this as insignificant because the list that controls should be the conveyance list.

[39] Article III of the Proposed Settlement Agreement provides a process for correction of technical problems with the lands list:

> 1. The parties agree that any omissions, overinclusions, inconsistencies or errors now known or discovered in the list of original and substitute trust lands transferred to the trust pursuant to Sections 40(a)(1) & (2) of HB 201 shall be resolved as follows:
>
> (a) The State and the plaintiffs, and the State and the Trust Authority, once established, shall identify to the other party any omissions, overinclusions, inconsistencies or errors in the lists of original and substitute trust lands as soon as such problems are known or discovered, along with such information or other explanation as is necessary to determine the reason for the claimed omission or

However, it is likely that not all problems can be corrected without new legislation.

The court views this as a problem. It is essential that the beneficiaries obtain the benefit of their bargain. The beneficiaries are not assured of the benefit of the bargain if they are dependent on an act of a future legislature. The parties favoring settlement have advised the court that they are looking for a solution. The court believes they should have an opportunity to find one. If they have not found a solution by the time of the final approval hearing, the court (and the beneficiaries) will be forced to examine the degree of risk posed by the problem and the

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error.

(b) Any errors or omissions to the legal descriptions of the lists of original and substitute lands submitted pursuant to Sections 40(a)(1) & (2) of HB 201 necessary to accomplish the intent of the parties shall be corrected by the Department of Natural Resources (DNR) pursuant to the authority granted DNR under Sec. 17 of HB 201.

(c) Any additions, deletions, or substitutions to the list of original and substitute lands transferred to the trust pursuant to Sections 40(a)(1) & (2) necessary to accomplish the intent of the parties shall be obtained by legislative amendment or by transfer, exchange, or conveyance.

(d) As of the date of executing this agreement, the parties have identified in *Attachment B* the initial omissions, overinclusions, or substitutions to the lists of original and substitute lands transferred to the trust pursuant to Sections 40(a)(1) & (2) which they agree to correct pursuant to the terms of (b) and (c) above.

Settlement Agreement, at 5-6.

impact on the settlement if no solution is found.[40] However, the court will not deny preliminary approval on this basis.

The final enforcement issue raised by Weiss and AMHA relates to the enforceability of the "promise to pay the $200 million." Weiss Opp. at 17 (filed July 1, 1994). Weiss and AMHA argue that unless the full $200 million is in the trust fund at the time of dismissal, the State's promise to pay is unenforceable under article IX, and section 13 of the Alaska Constitution. Weiss Opp. at 17. The constitutional provision states:

> No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law. Unobligated appropriations outstanding at the end of the period of time specified by law shall be void.

Alaska Const., art. IX, § 13.

HB 371 appropriated $200 million to the "mental health trust fund" from these sources in these amounts:

Mental health trust income account balance on 6/30/95	$ 33 million
DNR – mental health trust income in the general fund	$11.7 million

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[40] It is certainly possible that failure to find a solution to the problem associated with the Salcha property could lead to non-approval. The acreage is large – 116,000 acres, over 10% of the reconstituted trust acreage. The court does not know the value of the parcel, but assumes it may also be significant.

Proceeds from sale of DNR land sale contracts portfolio	$ 25 million
Budget reserve fund	$130.3 million

These funds were appropriated. Moreover, section 1(e) of HB 371 provides that the appropriations "do not lapse." Thus, the only way the fund would not receive the sums is if they do not exist. The only item whose future existence is questioned is the proceeds from DNR land sale contract portfolio. DNR is currently in the beginning stages of offering the portfolio for sale. Commissioner Noah has recently begun inquiries regarding other sources of revenue to replace this item if it is unavailable. The court views the possible unavailability of the $25 million as a problem. However, there is a reasonable probability that it will be resolved by the time of final approval. If it is not resolved, the court and class members will have to evaluate the agreement in that light. The court does not find the problem to be a deficiency which precludes granting preliminary approval, but it may be an issue for consideration at final approval.

The third "serious deficiency" argued by Weiss and AMHA relates to their criticism that the proposed settlement agreement "is very unclear as to very critical terms." The court disagrees. To the extent that important issues were highlighted at the evidentiary hearing, the questions of interpretation were resolved by ascertaining the intent of the parties.[41] In light of the fact that the

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[41] Specifically, the State stated its intent was (1) that the trust would not be charged for access to state land; (2) that it intended that the settlement provisions of HB 201 were

assumed ambiguities were resolved in the beneficiaries' favor, there is no risk to the class from them.

Weiss and AMHA next assert that the land lists are of "questionable validity." Weiss Opp. at 18 (filed July 1, 1994). The claim is made that the land lists do not identify the boundaries of a large number of parcels. Admittedly, the lists do not contain legal descriptions. The court does not find that to be a serious deficiency. The court expects further evidence if the parties actually believe that approval should be denied on this basis.

Weiss and AMHA assert that "DNR is unlikely to accomplish the required land work accurately or in a timely manner." Weiss Opp. at 19 (filed July 1, 1994). This argument is not supported by any admissible evidence.[42] At this point it would be mere speculation to conclude that DNR cannot do the job it is required to do.

Weiss and AMHA argue that the management regime under the proposed settlement is illegal. They assert that the settlement would have to have the standard that the trust be "managed solely in the best interests of the beneficiaries under private trust law principles." Weiss Opp. at 20 (filed July 1, 1994).

HB 201 requires that trust land be "managed consistent with the trust principles imposed on the state by the

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incorporated into the agreement; and (3) that if the remedy provisions of art. VI, sec. 5 were invoked, the plaintiffs could reassert all claims they have today.

[42] The opposition referred to the affidavit of Ms. Hayes, which was struck because she was unavailable for cross-examination.

[Enabling Act]," but specific trust management standards are not specified in either HB 201 or the proposed settlement agreement. HB 201 § 17. To the extent not inconsistent with the Enabling Act, the trust lands are subject to the same provisions of law applicable to other state lands. *Id.* HB 201 requires DNR to adopt management regulations which must address at least four management principles:

> (1) maintenance of the trust land base;
>
> (2) management for the benefit of the trust;
>
> (3) management for long-term sustained yield of products from the land; and
>
> (4) management for multiple use of trust land.

HB 201 § 17 (to be codified as AS 38.05.801(c)).[43] DNR is required to consult with the trust authority before adopting regulations under AS 38.05.801(c). HB 201 § 9 (to be codified as AS 37.14.009(a)).

The statute and agreement are intentionally vague on the issue of the required management standard. In order to assure the support of the environmental and resource industry interest groups, language acceptable to all was adopted. The battle, if there is to be one, was reserved for the regulatory process. It is important that the class understand that it may require more litigation to ensure

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[43] These standards were pronoted by Mr. Volland based on the article by Fairfax, *et al.* discussed earlier. If there is legislative history to the effect that the Fairfax article was considered by the *Legislature*, the court's concerns about the standards would be greatly alleviated.

that regulations actually comply with the Enabling Act. Of course, it is possible that DNR will adopt regulations that satisfy the Act. It is also possible that all interest groups can be accommodated in the regulatory process. However, there are risks of future litigation presented by this approach.

The court disagrees with Weiss and AMHA regarding the illegality of the standard. What the class is entitled to is management under the requirements of the Enabling Act. This legislation cannot diminish those requirements because of the supremacy of federal law; this statute does not purport to diminish those requirements. If the Enabling Act requires management solely in the interest of the beneficiaries and under private trust principles, HB 201 does not displace that standard. The treatment of the issue in the settlement means that it may require further litigation to achieve the result. The court does not believe this is a serious deficiency. It is an issue which the class and court must analyze in final approval.

Finally, Weiss and AMHA argue that "lack of effective control of trust management by the Trust Authority is a serious deficiency." Weiss Opp. at 20 (filed July 1, 1994). Essentially, they argue that DNR management of trust lands without more control and supervisory authority by the Trust Authority results in a serious deficiency.

The court agrees with Weiss and AMHA that DNR's past trust management has been substandard. DNR generally has managed the lands as if there was no mental health lands trust and as if DNR had no fiduciary obligations to the beneficiaries of the trust. However, there are

certain factors which indicate that past behavior may not be the best indicator of the future.

HB 201 requires DNR to establish a separate trust management unit to manage the reconstituted mental health trust lands. Personnel in the separate trust unit will be applying only trust management principles and working under one set of policies and regulations. Management of trust land through this separate unit should make DNR more cognizant of its fiduciary responsibilities with regard to trust lands.

Commissioner Noah has acknowledged that with or without settlement DNR must change its management of trust lands. For the first time in the court's memory, someone in authority in DNR has acknowledged DNR's fiduciary obligations toward the trust regardless of this litigation and that DNR has not met those obligations in the past. To the extent that acknowledgement is the first step to cure, this is a hopeful sign.

The court concludes that this is not a serious deficiency in the settlement. It may be a concern for the class, but it does not automatically bar approval in the court's analysis. First, the court sees the hopeful signs noted. Second, if this case goes to litigation, the class will likely have DNR management of trust land.[44]

The court has also examined the settlement for serious deficiencies. None has been found.

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[44] It is possible that the "trustee" could be removed. However, the court is not aware of any instance where the trustee of a public land trust has been removed by a court.

For these reasons, the court concludes that the settlement does not have serious deficiencies which would preclude preliminary approval.

C. Is the Proposed Settlement without Improper Preferential Treatment of Segments of the Class?

The program portion of the settlement has changed little since the Chapter 66 proposal, and the court previously found no preferential treatment in that settlement. *See* Memorandum Decision and Order at 103-07 (Dec. 30, 1993). The program priorities in Chapter 66 do not favor any of the four major subgroups within the class. Memorandum Decision and Order at 104 (Dec. 30, 1993). No funds will be distributed directly to class representatives or other class members. The trust will be managed for the benefit of all trust beneficiaries.

Disparate treatment is possible, although not probable, under the HB 201 funding scheme. H.L. and Bosel expect the grants and contracts issued directly by the Trust Authority using money from the trust income account to fund services or programs which supplement the state's basic mental health program rather than for the basic program itself. *See* H.L. M/Prelim. Appr., at 19, 23. Assuming that to be true, if membership on the board of trustees of the trust authority becomes unbalanced, it is possible that some beneficiary groups might receive preferential treatment. However, this is mere speculation. A balanced membership within the Trust Authority's board of trustees should result in a balanced distribution

among beneficiary groups of money from the trust income account.[45]

The court concludes that the proposed settlement does not contain any preferential treatment of a segment of the class to an extent that would preclude preliminary approval.

D. Does the Proposed Settlement Fall within the Range of Possible Approval?

There is no purpose in sending notice of a proposed settlement to the class if it does not appear preliminarily to be within the range of approval. *Liebman v. J.W. Petersen Coal & Oil Co.*, 73 F.R.D. 531, 535 (N.D. Ill. 1973). In order to determine whether a settlement is within the range of possible approval, the court must make a preliminary evaluation based on the general standards for final approval of "fairness" and "adequacy" within the unique context of preliminary approval. *In re Mid-Atlantic Toyota Antitrust Litigation*, 564 F. Supp. 1379, 1383-85 (D. Md. 1983). Final approval requires a finding that the settlement as a whole is "fair, adequate, and reasonable." *Class Plaintiffs v. City of Seattle*, 955 F.2d at 1291; *Newberg on*

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[45] Weiss and AMHA argue that the Trust Authority could spend trust income for the benefit of someone other than the beneficiaries. The court concludes that the money could only be spent in furtherance of the integrated comprehensive mental health program and, thus, that is not legally possible. *See* HB 201 § 16 (to be codified as AS 37.14.041(a)(1) and AS 37.14.045(a)). As well, the Trust Authority has the duty to deal with trust beneficiaries impartially. HB 201 § 8 (to be codified as AS 37.14.007(b)(12)).

Class Actions 3d § 11.41, at 11-91; *MCL 2d* § 30.44, at 242. However, a "settlement need not provide the best or speediest relief imaginable to be fair, adequate, and reasonable." *Officers for Justice*, 688 F.2d at 636; *see also* 2 H. Newberg, *Newberg on Class Actions, Second* § 11.45, at 460-61 (2d ed. 1985 & Supp. 1992) ("[a] settlement does not have to be a brilliant one in order to secure judicial approval").

The most important factor in evaluating fairness is a comparison between the likely result of litigation and the remedy provided in the settlement. *See Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14, 67 L.Ed.2d 59, 67 n.14 (1981); *Armstrong*, 616 F.2d at 314; *Newberg on Class Actions 3d* § 11.41, at 11-93 to 11-94; *MCL 2d*, § 30.44, at 242 ("whether the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued"). Other factors the court may consider in final approval include:

(1) Expense, complexity, and likely duration of further litigation;

(2) Extent of discovery completed;

(3) Experience and views of counsel;

(4) Amount of opposition to the settlement;

(5) Defendant's ability to pay (what constitutes a feasible remedy);

(6) Presence of collusion in reaching a settlement.

Class Plaintiffs v. City of Seattle, 955 F.2d at 1291; *Armstrong*, 616 F.2d at 314; *Newberg on Class Actions 3d* § 11.43, at 11-97. The court also must consider whether the interests of the class were adequately represented by the

named plaintiffs and counsel. *Malchman v. Davis*, 706 F.2d 426, 433 (2nd Cir. 1983). The relative importance of the various factors depends upon the nature of the claims, type of relief sought, and the unique circumstances of an individual case. *Class Plaintiffs v. City of Seattle*, 955 F.2d at 1291; *Officers of Justice*, 688 F.2d at 625. In evaluating the fairness of a settlement, the court as well as the parties must remember that "compromise is the essence of a settlement." *S.E.C. v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984); *Cotton*, 559 F.2d at 1330. A settlement may compromise some potential remedies available to the class, if as a whole the settlement is fair, reasonable, and adequate. *Armstrong*, 616 F.2d at 315, 317.

Although this is only the preliminary approval stage, it is useful to examine whether the agreement is within the range of acceptable results, considering those factors that would be examined at the final approval stage.

1. Comparison with further litigation

The HB 201 settlement would reconstitute the trust with land in the form of 550,000 acres in fee and 378,000 acres of subsurface estate plus $200 million cash.

The agreement purports to require most of the land to be conveyed to the trust authority prior to final approval of the settlement.[46] Settlement Agreement, art.

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[46] The proposed settlement agreement provides:

1. *Transfer of Land by Quitclaim Deed And Delivery of Conveyances.* Land and interests in land conveyed to the Trust Authority shall be granted in trust to the

IV, § 1, at 6-7. The proposed settlement agreement states that prior to dismissal of the action, the State will tender to the court the deeds for conveying the listed state lands to the Trust Authority.[47] Settlement Agreement, art. IV, § 1, at 6-7.

> "Alaska Mental Health Trust Authority, trustee" by quitclaim deed. On or before the entry of any order for dismissal, the State shall tender to the Superior Court the required deeds conveying to the Trust Authority the appropriate State interest in the lands designated as mental health lands pursuant to Sections 40(a)(1) & (2). Upon approval of this settlement by the court and dismissal of this action, the deeds shall be placed in escrow for delivery to the Authority upon its request. The parties recognize that certain of these deeds will use parcel numbers which reference the State maps that describe the lands in *Attachment A* in lieu of full legal descriptions and, accordingly, may not be in recordable form at the time they are tendered to the court. The State agrees to use its best efforts and to work with the authority to complete the preparation of recordable deeds for delivery to the Authority as soon as practicable after dismissal.

Settlement Agreement, art. IV, § 1, at 6-7 (June 10, 1994).

[47] The conveyances from DNR to the Trust Authority probably will not be complete before the case is dismissed under the present compressed schedule. *See* Weiss Opp. at 19. The HB 201 settlement agreement acknowledges that full legal descriptions may not be available at the time the deeds are tendered to the court. Settlement Agreement, art. IV, § 1, at 7 (June 10, 1994). Some parcels are likely to be described only with parcel numbers corresponding to numbered parcels on DNR maps. *Id.* The State "agrees to use its best efforts and to work with the [Trust] Authority to complete the preparation of

Mental health trust land selections not yet conveyed to the State by the federal government will be conveyed as the State receives them. DNR will consult the Trust Authority when it determines the annual conveyance priorities submitted to the Bureau of Land Management. Settlement Agreement, art. IV, § 9, at 11 (June 10, 1994). In addition, if the land parcels eventually conveyed to the State from the federal government are different from those described on the lists referenced in HB 201, the State will compensate the trust with other land of a similar character, equal value, and similar revenue-producing potential. Settlement Agreement, art. IV, § 2 (June 10, 1994).

The Settlement Agreement contains no provision to compensate the trust for encumbrances that are inconsistent with the revenue-producing mandate of the trust. Settlement Agreement, art. IV, § 3, at 8 (June 10, 1994). The State will bear the recording costs for all documents required by the agreement, but there is no requirement that the State pay surveying costs. *See* Settlement Agreement, art. IV, § 5 (June 10, 1994). Costs could be quite high for surveying parcel boundaries, easements, and other encumbrances. The Trust Authority will obtain quitclaim deeds only, but in the settlement agreement the State warranted that "it has the legal authorization necessary to convey the land or interest in land" for lands to be conveyed. Settlement Agreement, art. IV, sec. 2, at 7 (6/10/94). The agreement provides for compensation with other land if the warranty is violated. *Id.*

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recordable deeds for delivery to the Authority as soon as practicable after dismissal." Settlement Agreement, art. IV, § 1, at 7 (June 10, 1994).

An appropriation bill, HB 371, has already been passed to fund the $200 million payment into the trust fund created by section 12 of HB 201. This monetary corpus will be managed by the Alaska Permanent Fund Corporation, which has demonstrated acceptable management of the permanent fund for the state's oil revenues. Income from investment of the trust fund will provide some trust revenue even without land development. Thus, at least some income stream is assured from the beginning for the Trust Authority's use in making grants and contracts under section 16 of HB 201.

In addition, the HB 201 settlement includes the program improvements contained in the Chapter 66 settlement with few changes.[48] A Trust Authority would be created whose duties include ensuring that trust assets are managed consistent with the Enabling Act [HB 201 § 9]. The Trust Authority's purpose is to ensure an integrated comprehensive mental health program. The Trust Authority would have the power to spend income from the trust without further legislation.[49] The Trust Authority must develop a budget for the integrated comprehensive mental health program. HB 201 § 27 (to be codified as AS 47.30.046(a)).

HB 201 strengthens the budgeting process for the mental health program. First, a budget for general fund

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[48] The program improvements contained in Chapter 66 will be repealed automatically if the deadline for dismissal is not met. *See* HB 201 § 48.

[49] The class should be aware that this provision may not withstand a constitutional challenge should one be raised. It is a risk to be evaluated by the class.

appropriations is prepared by the Trust Authority as noted above. Second, if the governor's appropriations bill for funding the mental health program differs from the Trust Authority's budget, the governor must provide a report which explains the reasons for the differences. HB 201 § 5 (to be codified as AS 37.14.003(b)). Third, in the event of a veto of an appropriation, the governor must explain the veto in light of the Trust Authority's recommendations. HB 201 § 6 (to be codified as AS 37.14.003(c)). Fourth, appropriations for the mental health program must be made in a separate bill limited only to those appropriations. HB 201 § 7 (to be codified as AS 37.14.005(b)). Fifth, the legislature must issue a report explaining any differences between the Trust Authority's recommended general fund budget and the appropriation bill passed. *Id.* at AS 37.14.005(c).

In summary, the proposed settlement would provide: (1) reconstitution of the trust with some original mental health trust lands, some substitute lands, and $200 million; (2) program improvements; (3) the Trust Authority; and (4) budget process advantages.

Litigation results are, of course, unknown. However, it is very clear that program improvements, the Trust Authority, and budget process advantages could not be obtained through litigation.[50]

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[50] It is possible that the court could order that DNR be removed as trustee of the lands. However, it is unclear what trustee would be appointed. Moreover, it would be an extraordinary act to remove a trustee of a public trust named by the Congress.

It is difficult to compare the results of litigation versus the settlement results with respect to the trust corpus. The task is difficult in part because of the difficulties of assessing litigation risk for lands to be returned to the trust, and more importantly, because of problems with valuation. The court will analyze the issues from various perspectives.

If HB 201 is valid, the result of further litigation is clear. The trust would be reconstituted with exactly the same lands as those in the settlement. The trust would be managed by DNR. The class would not receive the other benefits of the settlement: $200 million, the Trust Authority, the program enhancements and the budget advantages. If HB 201 is valid, it is clear that the class would benefit from the settlement. However, this court has once before questioned the legislature's ability to settle the case unilaterally. *See* Memorandum Decision and Order Re: Preliminary Injunction, at 8-9 (July 10, 1990). Therefore, it is also important to look at results of litigation if HB 201 is not valid.

In a best-case scenario, in litigation the trust would be reconstituted with all of the original mental health trust lands. DNR would manage the trust, unless removed as trustee by the court. There would be no warranty of title or survey beyond that done before federal patent.[51] If the plaintiffs succeeded in having all the original trust lands returned to the trust, the trust would

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[51] The court understands the surveys to have been large "four-corners" surveys.

not receive any cash compensation.[52] The best-case scenario is not very likely because it is likely that some of the original land would be classified as "sold."

In a worst-case scenario, in litigation the trust would receive the original mental health lands that are undisputedly not "sold." It is entirely possible, if not likely, that there would be no cash component.[53] This worst-case scenario would not occur unless HB 201 was declared invalid.

The court concludes that the likely result is somewhere between the best and worst-case scenarios. It is likely that some of the lands which the State maintains have been "sold,"[54] would not be returned to the trust. It is also likely that the set-off would be large enough that

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[52] The State has to pay cash only to reimburse the trust for original trust lands "sold" by the State after the 1978 legislation. *See Weiss v. State*, 706 P.2d at 684. This scenario hypothesizes that no land would be classified as "sold."

[53] The court's analysis is that it is likely that the State's set-off will exceed the value of lands which the court determines were "sold." In order for the trust to receive cash as a result of litigation, the value of the lands "sold" would have to be more than the State's set-off for expenditures on the mental health program since 1978. *See Weiss v. State*, 706 P.2d at 684. The State has expended a substantial sum of money on the mental health program since 1978, though the parties dispute what sums should be included. In HB 201, the legislature set the amount at more than $1.3 billion. The most generous estimates of value of the *entire* original mental health trust lands are in the range of $1.9 – 2.0 billion.

[54] The State maintains that sales to third-party purchasers, the Cook Inlet Regional Corporation exchange, lands used by other state agencies, and lands in legislatively designated areas ["LDA's"] were "sold."

the trust would not receive cash compensation for these "sold" lands. One valuation[55] would place these values on those disputed lands:

Third-party purchasers	$150 million
CIRI	45 million
State agencies	15 million
LDA's	200 million
TOTAL	$410 million

If that valuation is correct, there is $410 million worth of land which distinguishes the best and worst case scenarios. Of course, this analysis suffers from the same problem as most others: whether the valuation is correct.

There has been substantial dispute about the value of these lands from the beginning of settlement attempts. Questions over value led to the demise of the Chapter 48 settlement attempt. The Interim Mental Health Trust Commission placed a value on original mental health trust lands at about $2.2 billion in 1989; the State valued the lands at about $564 million. *See* Interim Mental Health Trust Commission Final Report (Dec. 20, 1989) (filed April 3, 1990). The valuation question has not disappeared.

The court believes that two principles are important to apply in evaluating the valuation questions with respect to the settlement versus the result of litigation: (1) in comparing the original trust with the reconstituted trust, it is most important to use the same assumptions and approach; and (2) all valuations of the land value are

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[55] The court believes this valuation to be made under Chap. 66 assumptions, but it is not clear.

based on probabilities.[56] In light of the first principle, the court will examine the various methods under the same assumptions.

Substantial valuation work was done by the Mental Health Lands Project to value original trust lands and proposed substitute lands under the Chapter 66 implementation efforts. These valuations were made assuming the provisions of the Chapter 66 settlement and therefore the values may not be sound for this settlement. Under Chapter 66 assumptions, the value of the original trust lands totalled $1.9 billion. Using those same assumptions, the reconstituted trust is valued at $1.1 billion. In light of the litigation risks associated with recovering all of the original lands, and the addition of $200 million and the other benefits of the settlement, the court concludes that evaluated this way, this settlement is within the range of acceptable settlements.

Mr. Erickson, an expert retained by Weiss and AMHA, asserts that the provisions of this settlement make the land much less valuable than it would have been under the provisions of Chapter 66. He has made discounts for (1) DNR management,[57] (2) quitclaim deeds versus warranty deeds, (3) lack of survey, and (4) split

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[56] The most significant field in anyone's valuation is for mineralized lands. However, very little is actually known about the lands. While the original lands have been the subject of geological survey, very little core drilling has been done. Thus all values are guesses, educated guesses, but guesses nonetheless.

[57] Mr. Erickson assumes the worst: the trust will be managed under the rules applicable to other state lands with no concern for the fact it is trust land.

estate and access problems. Under his evaluation, the land in the reconstituted trust is worth $566 million to which he adds the $200 million cash for a grand total of $766 million for the settlement. He did not perform the same calculations for the original trust lands, and it is important not to compare that number to $1.9 billion because the numbers are based on different assumptions.

No one provided the court with a breakdown of the $1.9 billion valuation so that Mr. Erickson's approach could be applied to obtain a value of the original mental health trust lands. In order to provide the best comparison possible with the limited data available to the court, the court has taken the Interim Mental Health Trust Commission's valuation of the original trust lands (which with Dr. Metz' revised mineral valuation totals $2.0 billion) and applied the approach. The results are found in the chart attached as Appendix A.[58] Applying Mr. Erickson's discounts to the Interim Commission's values and assuming that one-half of the lands were under DNR lease, the discounted value of original trust lands is $921.5 million.[59]

Using these figures, the comparison is between $921.5 million with a reduction for the risks of litigation

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[58] The court has used the aggregate percentage discounts as set out in Exhibit 4 (evidentiary hearing) prepared by Mr. Erickson.

[59] Of course this number could be very inaccurate if the values used in the Chapter 66 valuation which totalled $1.9 billion are very different from the Interim Commission's values. Additionally, as shown in Appendix A, if less than one-half of the lands were under DNR lease, the reduced value of the original trust lands is much smaller.

versus a land package worth $566 million, a cash component of $200 million and other benefits of the settlement. Under this approach the settlement is within the range of possible approval.

The final approach on which the court has received testimony comes from Samuel Smith, chief of the Division of Mining in DNR. Mr. Smith has analyzed the mineral value of lands which will not be returned to the trust. He starts with Dr. Metz's[60] calculation for mineral values on lands which will not be returned, $620 million. Mr. Smith has discounted that number for three of four factors on which he believes Dr. Metz erred. His revised value is $130 million. In light of the fact that mineralized land forms the bulk of everyone's valuation of original trust land, Mr. Smith's calculations, though partial and preliminary, would suggest that this settlement is within the range of acceptable settlements.

In summary, it is too soon for the court to determine what is the best valuation of the trust, but using consistent rules in any approach suggests that this settlement is within the range of acceptable settlements. However, several assumptions have been made which may be in error. The court expects to look at this issue carefully at the final approval stage.

It is important that the class considers the importance of cash to them. In essence this settlement trades some land which might be returned to the trust for cash. Risk averse individuals stress the importance of having cash

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[60] Dr. Metz was hired by plaintiffs to do valuations on the mineral estate of original trust lands.

now against the possibility of earning money in the future. Those willing to take more risks may regard cash as a bad trade for the possibility of earning much larger amounts later. This philosophical difference is part of the conflict between plaintiffs' attorneys.

2. Trial

A trial would be extremely expensive, lengthy, and complex, probably involving defendant classes as well as the plaintiff class.[61] A defendant class of third-party holders of interests in state land could contain thousands of members and require several separate subclasses. The cost to all parties in time and money would be enormous. The cost is not, perhaps, of significant interest to the class, since fees are paid by the State. However, delay should be significant. It could be years before the litigation is resolved if the case is not settled. The improvements to the mental health program and the reconstitution of the trust could be delayed for many years.

3. Discovery

While plaintiffs have not received access to all DNR records concerning agricultural parcels that contain original trust land, they know much more about the original

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[61] Weiss and AMHA already have filed motions to certify defendant classes for municipal and coal-lessee defendants. *See* Motion to Certify Class of Municipal Defendants (March 29, 1994); Motion to Certify Class of Coal Lessee Defendants (July 14, 1994).

trust lands and potential trust lands than they did in 1991 when Chapter 66 was passed. At this point plaintiffs' attorneys seem to have sufficient information about original trust lands and state lands in general to adequately evaluate the current proposal of a mixed land and cash settlement.

4. Opposition

The amount of opposition within the class cannot be fully evaluated by the court until the fairness hearing after the class has notice. Therefore the court can draw no conclusions at this time with regard to opinions of the class regarding the fairness and adequacy of the proposed settlement agreement.

5. Collusion

Weiss and AMHA imply that counsel for H.L. and Bosel negotiated a settlement favorable to the State in order to encourage the State to withdraw from the Chapter 66 settlement, which H.L. and Bosel opposed. Weiss Opp. to Prelim. Appr., at 11. Weiss and AMHA contend that H.L. and Bosel negotiated outside the parameters of what they had agreed the settlement should contain. Despite Weiss and AMHA's claims to the contrary, the court concludes there was no collusion during the negotiations.

In summary, based on this preliminary examination, the court concludes that this settlement is within the range of possible final approval.

VI. CONCLUSION AND ORDER

The HB 201 settlement appears to provide sufficient benefits to the class to justify preliminary approval. The negotiations apparently were serious, informed, and non-collusive. Deficiencies in the settlement are not sufficiently serious to warrant disapproval at this preliminary stage. There is no disparate treatment of any of the major groups of plaintiff class members. There are problems presented; some of them may be resolved by the time of the final approval hearings. There are also risks presented which need to be carefully evaluated by the class. However, the requirements for preliminary approval have been met.[62]

Thus,

IT IS HEREBY ORDERED that the court grants preliminary approval to the settlement filed June 10, 1994.

DATED at Fairbanks, Alaska this 29th day of July, 1994.

/s/ Mary E. Greene
MARY E. GREENE
Superior Court Judge

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[62] Preliminary approval does not mandate final approval if class comments or other evidence at hearings shows that the HB 201 settlement is not in the best interests of the class or does not meet the standards for final approval.